90-380

No. 90——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: September 4, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

A vertically integrated producer allegedly having monopoly power in one line of commerce follows a concededly legitimate "make-or-buy" policy under which it is willing to buy a component of its output from a non-integrated competitor so long as the cost of buying the component does not exceed its cost of making the same component. The questions presented are these:

1. Is the producer required by Section 2 of the Sherman Act to sacrifice profits and efficiency by purchasing the competitor's component at a price exceeding its own cost of producing the same component?

2. Is a full-fledged trial required under Section 2 merely because the court believes that the producer's nonexclusionary, legitimate business practice may have been motivated in part by competitive animus?

3. Does the "essential facilities" doctrine alter the requirements generally applicable under Section 2 by proscribing an otherwise legitimate, profit-maximizing business practice merely because that practice may produce an "unreasonable" rate of increase in revenues?

LIST OF PARTIES AND RULE 29.1 LIST

The parties in the court of appeals were Consolidated Rail Corporation, petitioner herein, and Delaware and Hudson Railway Company, respondent herein. Consolidated Rail Corporation has no parent company. Consolidated Rail Corporation has the following subsidiaries:

1. Calumet Western Railway Company
2. Indiana Harbor Belt Railroad Company
3. CRC Properties, Inc.
4. Merchants Despatch Transportation Corp.
5. St. Lawrence & Adirondack Railway Company

Consolidated Rail Corporation has the following affiliates:

1. Akron & Barberton Belt Railroad Company
2. Albany Port Railroad Company
3. Belt Railway Company of Chicago
4. Chicago & Western Indiana Railway Company
5. Lakefront Dock & Railroad Terminal Company
6. Monongahela Railway Company
7. Nicholas, Fayette & Greenbrier Railroad Company
8. Peoria & Pekin Union Railway Company
9. Pittsburgh, Chartiers & Youghiogheny Railway Company
10. Transportation Data Xchange, Inc.
11. Trailer Train Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the court of appeals reversing summary judgment for petitioner Consolidated Rail Corporation ("Conrail") and remanding is reported at 902 F.2d 174 (2d Cir. 1990), and is reprinted in the appendix hereto ("Pet. App.") at 1a. The opinion of the district court granting summary judgment for Conrail is reported at 724 F. Supp. 1073 (N.D.N.Y. 1989), and is reprinted here at Pet. App. 14a. The opinion of the district court denying Conrail's motion to dismiss the complaint or, in the alternative, stay the litigation on primary jurisdiction grounds is reported at 654 F. Supp. 1195 (N.D.N.Y. 1987), and is reprinted here at Pet. App. 30a. The court of appeals' order denying Conrail's petition for rehearing is not reported, and is reprinted here at Pet. App. 50a.

JURISDICTION

The judgment of the court of appeals was filed on April 20, 1990 (Pet. App. 12a-13a), and a timely-filed

petition for rehearing was denied by order dated June 6, 1990 (Pet. App. 50a). This petition is being filed within 90 days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

The pertinent statutory provision in this case is Section 2 of the Sherman Act, 15 U.S.C. § 2, which is set forth in full on the last page of the appendix hereto (Pet. App. 71a).

STATEMENT OF THE CASE

A. *Introduction*

This private treble-damage antitrust action was brought against Conrail by the Delaware and Hudson Railway Company ("D&H") under Section 4 of the Clayton Act, 15 U.S.C. § 15.[1] Conrail is a freight railroad operating in the northeastern and midwestern United States. D&H is a railroad operating in the northeast, principally in New York and Pennsylvania.

D&H alleges that Conrail has violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize an alleged relevant market for the transportation of newsprint between eastern Canada and the mid-Atlantic states.[2] The newsprint traffic at issue

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[1] Section 4 allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [to] sue therefor . . . and . . . recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Section 4 and 28 U.S.C. § 1331 provide the basis for federal jurisdiction in this case.

[2] D&H had originally alleged a much broader relevant market but, in response to Conrail's motion for summary judgment, narrowed its proposed market definition. While Conrail disputes that D&H has correctly defined any relevant market, the parties agreed for purposes of Conrail's summary judgment motion that the market at issue is as described above. Pet. App. at 18a.

originates in Canada on Canadian railroads, and is then interchanged near the U.S. border, either (1) directly with Conrail for movement solely on Conrail's tracks to its ultimate destination in the mid-Atlantic region; or (2) with another carrier, such as D&H, which carries the traffic part of the way and then interchanges with Conrail for final delivery to the customer. D&H challenges the method Conrail used to determine the price Conrail would pay for D&H's participation in joint service for the U.S. portion of such shipments.

Conrail determined that price by a method known as "make-or-buy," which simply means that Conrail would not "buy" a service (in this case, D&H's rail transportation for part of a shipment) if it could "make" that service itself less expensively. The flip-side of this principle is that Conrail would not "sell" its services below its profit-maximizing price. "Make-or-buy" is the standard approach of any business that must decide whether to buy a particular component from a third party or to make it internally. The calculation is quite simple: if a third party is more efficient, then buying the component from that third party would be less expensive than making it; if internal manufacture is more efficient, then making would be less expensive than buying. For the economy as a whole, the result is efficient resource allocation, since the lowest cost producer will end up making the component at issue.

B. *Conrail's Make-Or-Buy Policy and D&H*

1. The transportation of newsprint at issue here involves two Canadian carriers, the Canadian National Railway Company ("CN") and Canadian Pacific Limited ("CP"). In 1982, these two carriers, responding to truck competition, individually proposed a series of reductions to the existing rates for specific point-to-point newsprint movements. In each instance, CN or CP was the exclusive rail carrier serving the origin station. For the ma-

jority of routes affected by the Canadian proposal, Conrail was the exclusive rail carrier serving the destination point. The existing rate typically was the same for all possible routes between the Canadian origin and the destination, including routes where Conrail interchanged directly with the Canadian carrier, routes where D&H could serve as an intermediate carrier, and routes where railroads other than D&H could serve as intermediate carriers.

Each Canadian proposal to reduce a particular newsprint rate was communicated to both Conrail and D&H with the condition that the Canadian carrier's historic division [3] of revenue would remain the same. Subtracting the Canadian carrier's division from the proposed rate permitted Conrail to apply its make-or-buy analysis. Under the existing divisions, this analysis uniformly showed that Conrail would earn the greatest "contribution" [4] when it "made" the component itself, that is, when Conrail interchanged directly with the Canadian carrier and moved the traffic the entire route to its ultimate destination, and that it would cost more to buy the participation of an intermediate carrier such as D&H. Thus, Conrail agreed to the new, lower rates proposed by the Canadian carriers over those routes that yielded Conrail the greater profit, i.e., those without intermediate carriers.

In most cases, D&H then sought Conrail's concurrence in the application of the reduced rate to movements that included D&H as an intermediate carrier. Conrail notified D&H that it would neither concur in the reduction at the old division levels between Conrail and D&H nor

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[3] "Division" refers to the portion that each participating railroad receives of the amount paid by a shipper for the overall, origin-to-destination shipment.

[4] "Contribution" is the contribution to fixed costs and profit that a carrier receives for moving freight over any part of a route, i.e., the revenue less the variable costs associated with that freight movement.

"buy" service from D&H at a less profitable revenue level than if Conrail were to "make" that service itself. Conrail offered to buy D&H's services only at a price equal to its own cost of providing the same service, i.e., only if its contribution for the joint movement equaled its contribution for the single-line Conrail route.[5] D&H then had to decide whether it would charge a price for its portion of the joint service that would have made the joint service price-competitive with Conrail's single-line service.

The effect of Conrail's proposal would have been to reduce D&H's historic division for the U.S. portion of the overall shipment. D&H rejected this proposal and insisted on its historic division, thus preventing the reduced rates from taking effect if D&H were included in the route. Neither the originating Canadian shippers nor CN and CP were affected by this impasse, because they continued to demand—and receive—the lower origin-to-destination rate from Conrail.[6]

2. This impasse between Conrail and D&H resulted from a regulatory evolution in the rail industry. The divisions D&H sought to retain were vestiges of the

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[5] For example, suppose that Conrail charged $100 to move traffic from the point of interchange to the ultimate destination, and that Conrail had an internal cost of $50 to move the traffic over that part of the route over which D&H could also move the traffic. Under the make-or-buy analysis, if D&H were to charge Conrail $45 to move the traffic over its intermediate route, Conrail would offer to "buy" D&H's participation, since doing so would increase Conrail's contribution by $5. If, however, D&H were to charge $55, Conrail would not offer to "buy" D&H's participation, since doing so would reduce Conrail's profits by $5. In all cases, Conrail chose the most efficient, profit-maximizing routing.

[6] It bears noting that CP is now in the process of buying D&H; if that purchase is accomplished, CP will have the same decision whether to provide service itself or buy it from Conrail. It also bears noting that CP's requests for and receipt of rate reductions from Conrail in other markets evidences CP's strong bargaining position.

regulatory system that had begun changing in the mid-1970s in response to the steady decline of the domestic rail industry after World War II. The decline reached crisis proportions with the bankruptcies of Conrail's predecessors, the Penn Central Transportation Company and other rail carriers in the northeast and midwest. Confronted with the imminent collapse of rail service in a large part of the country,[7] Congress in 1973 passed the Regional Rail Reorganization Act, Pub. L. 93-236, 87 Stat. 985 ("3R Act"), which authorized the government to oversee the reorganization and consolidation of the bankrupt railroads.[8]

At the same time, Congress began to investigate why the financial health of the rail industry had so badly deteriorated. It found that the crisis was due substantially to a pervasive, inflexible regulatory scheme administered by the Interstate Commerce Commission ("ICC") and a collective approach to ratemaking followed by the railroads. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 10-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 23-25; H.R. Rep. No. 1430, 96th Cong., 2d Sess. 111, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4143. Among the most uneconomic practices was the railroads' collective maintenance of a nationwide system of equalized rates, which both undermined overall industry profitability and hindered individual railroads' efforts to achieve greater efficiency and to compete successfully with other transportation modes.[9]

Prior to passage of the 3R Act, the ICC's avowed policy had been to avoid price competition among railroads of-

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[7] *See* S. Rep. No. 601, 93d Cong., 1st Sess. 7-9, *reprinted in* 1973 U.S. Code Cong. & Admin. News 3242, 3248-50.

[8] Conrail was created to acquire and to provide rail service over the rail properties formerly owned and operated by the Penn Central and five other bankrupt railroads. *See generally Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[9] *See generally* T. Keeler, *Railroads, Freight and Public Policy* 24-32 (1983).

fering alternative routes between a particular origin and destination. Rates were set collectively in "rate bureaus" so as to equalize the charges over all routes regardless of the relative efficiency of the routes or carriers involved. While prices over such alternative routes were equalized, the costs were not equal. Because rates were generally maintained at levels high enough to permit participation of even the least efficient railroads, rate equalization subsidized inefficient railroads and routes while drawing traffic away from more efficient but under-utilized routes. Railroad rates were thus generally higher than truck rates, and railroads lost business to trucks.

This crisis led Congress to conclude that extensive regulatory reform was essential if the domestic rail industry was to survive without being nationalized. It first enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4R Act"), then the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"). The Staggers Act mandates that the ICC, to the maximum extent possible, allow independent, demand-based pricing (49 U.S.C. § 10101a; H.R. Rep. No. 1430, *supra*, at 79), and assist efficient railroads to attain revenue adequacy (49 U.S.C. § 10704). The Act further instructs the ICC to minimize its regulatory oversight of rates (49 U.S.C. § 10101a), but provides for continued regulation of rate reasonableness only if the ICC determines that a carrier has market dominance over the transportation to which a particular rate applies (49 U.S.C. § 10701a).[10]

The ICC has pursued these directives. Most pertinent here, it has approved a ratemaking policy identical to Conrail's make-or-buy policy. In *Guilford Transp. Indus., Inc.—Control—Boston & Me. Corp.*, 5 I.C.C.2d 202, 218 (1989), the ICC found that

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[10] The ICC has not found that Conrail has market dominance for the newsprint traffic at issue.

> [f]rom the standpoint of financial incentives, we would expect Guilford to seek a division on the MEC-CN route that provides the Guilford system a dollar contribution above its attributable costs of service at least equal to the dollar contribution above its attributable costs that Guilford receives from movements over the long-haul route. . . . We could not regard such a division policy as anticompetitive; it would merely reflect the cost of the alternative means of providing service available to Guilford.[11]

The rail industry supports the make-or-buy approach.[12]

C. *Course of Proceedings and Disposition Below*

D&H's original complaint challenged virtually all of Conrail's new rate policies as anticompetitive insofar as they affected D&H by eliminating the subsidies D&H enjoyed under the old regulatory system. After extensive discovery and in response to Conrail's motion for summary judgment, however, D&H pared its claims to encompass only Conrail's response to the series of rate re-

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[11] The companies adopting and supporting the make-or-buy approach in *Guilford* are D&H's parent and sister companies.

[12] For example, in testimony in 1985 on behalf of the Association of American Railroads ("AAR"), Professor William Baumol and (then) Professor Robert Willig stated that "each of the parties in a voluntary negotiation over the terms of a vertical relationship such as a joint route will earn the greatest profit available to it if it selects as its partner, in each transaction, the entity that is in a position to carry it out most efficiently and cheaply." Reply Verified Statement of William J. Baumol and Robert D. Willig, *Intramodal Rail Competition*, ICC Docket Ex Parte No. 445 (Sub-No. 1) (July 5, 1985), Pet. App. at 65a. D&H was a member of the AAR at the time of this submission and did not dissent. Excerpts from the Verified Statement and Reply Verified Statement of Messrs. Baumol and Willig in that proceeding are set forth at Pet. App. 59a-66a. In addition, excerpts from the Verified Statement of Professor Baumol in *Iowa Power and Light Co. v. Burlington Northern R.R.*, ICC Docket No. 40224 (May 21, 1990), are set forth at Pet. App. 51a-58a.

ductions for newsprint traffic proposed by CN and CP. But the make-or-buy analysis underlying that response forms the foundation of Conrail's systemwide ratemaking. Thus, D&H's claims, even as truncated, challenge the basic premise of Conrail's (and most other rail carriers') rate methodology established in response to Congress' deregulation of the industry.[13]

Conrail moved for summary judgment, arguing that, as a matter of law, its make-or-buy policy was not anticompetitive. Alternatively, Conrail argued that D&H had failed to present significant, probative evidence of a relevant market for newsprint transportation or of Conrail's monopoly power in that alleged market.

On November 20, 1989 the district court granted summary judgment for Conrail and dismissed D&H's complaint in its entirety. Pet. App. at 29a. The district court held that Conrail's make-or-buy policy was lawful, finding that D&H had "not provided [the] court with one instance where Conrail refused to concur in joint rates with D&H where concurrence with D&H would have been more profitable for Conrail than non-concurrence. Thus D&H has failed to show how this make or buy policy . . . was anything but a valid business policy of Conrail, and therefore not violative of Section 2." Pet. App. at 23a.[14] The district court also rejected D&H's argument that Conrail's terms for permitting D&H to participate in newsprint movements were unreasonable and had foreclosed D&H from participation in the newsprint movements in violation of the so-called "essential

[13] *See generally* the Verified Statement of Professors Baumol and Willig, Pet. App. at 59a-62a.

[14] The court of appeals did not disagree with this finding. The district court also found—and again the court of appeals did not disagree—that it "would have been unprofitable for Conrail to concur in joint rates with D&H in situations where [Conrail] would have received more contribution if Conrail, alone, carried the freight." Pet. App. at 22a.

facilities" doctrine, holding that Conrail's make-or-buy policy did not create unreasonable terms of access.[15] Finally, in light of its holding that the conduct at issue was profit-maximizing and therefore lawful,[16] the district court did not reach the monopoly power issue.

On April 20, 1990 the court of appeals reversed and remanded for trial. *Id.* at 11a. The court of appeals noted "[t]he fact that profit maximization is a goal of the make or buy policy," and stated that that fact "provides support for an argument that the policy is a legitimate practice." *Id.* at 7a. The court held that there was a triable issue—and thus that a jury could ultimately hold Conrail liable for monopolization—solely on the basis of (1) the deposition testimony of Conrail's former senior vice president for marketing, which the court characterized as showing that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits";[17] (2)

[15] D&H trains would not physically enter Conrail's tracks; rather, D&H sought only to interchange newsprint traffic with Conrail. "Access" was thus merely a financial arrangement. As the district court found, Conrail "was, at all times, willing to allow D&H the use of Conrail's tracks, via joint rates with D&H, as long as the overall contribution Conrail received for the job would have been no less than the amount it would receive for non-participation." Pet. App. at 26a. "In the instant case, the plaintiff has failed to prove that Conrail denied D&H the use of Conrail's tracks. Therefore, the plaintiff cannot prevail in its antitrust claim utilizing the essential facilities doctrine." *Id.*

[16] "Clearly," the district court held, "profit maximization is a legitimate business goal. The defendant's make or buy policy's sole goal is profit maximization. Therefore, this court finds that the defendant has not engaged in exclusionary conduct violative of Section 2." Pet. App. at 24a.

[17] The court of appeals mischaracterized the testimony. The relevant colloquy simply reflected the profit-maximizing nature of Conrail's make-or-buy policy:

Q. So whether Conrail's participation in traffic other than its long haul was profitable or not, you understood the policy

statements of Conrail employees "that a shift of D&H's traffic to Conrail would be desirable"; (3) a Conrail analyst's statement that D&H would be unlikely to concur in a joint rate under the make-or-buy policy; and (4) the court's inference that the make-or-buy policy injured D&H, an inference not based on any evidence of actual injury to D&H, but only on a Conrail employee's statement that he favored a monopoly. *Id.*

The court of appeals also held that there was a triable issue whether the make-or-buy policy unlawfully denied access to an "essential facility." This invocation of the controversial "essential facilities" doctrine was based on the purported increased revenues (over the historic divisions) Conrail would realize if D&H had accepted Conrail's make-or-buy based offers for joint service. This "issue" arose from the court's reliance on a hypothetical example created by the district court under which Conrail's revenues for some movements would increase by 800% under the make-or-buy policy.[18] *Id.* at 10a.[19]

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goal to be to divert that traffic to Conrail's long haul if that long haul generated the most profit for Conrail?

A. Yes. The idea was for us, if we were going to participate in the traffic, as a prudent businessman, you would try to, to maximize your contribution, not your gross dollars, but your contribution dollars. . . .

Dep. of James A. Hagen at 56 (Dec. 8, 1987).

[18] The district court had created a hypothetical example and supplied hypothetical prices to illustrate the operation of the make-or-buy policy. Pet. App. at 22a & n.7. Repeatedly citing the purported 800% increase and treating it as a fact, the court of appeals held that there was a triable issue whether Conrail had unreasonably denied D&H access to its tracks.

[19] Conrail had also raised its lack of monopoly power as an alternative ground for affirming the district court. The court of appeals stated that it was "not presented with a well-developed record on that question," which the district court had not decided; nevertheless, without identifying the relevant facts in dispute, it was "persuaded that D&H [had] presented" a triable issue. Pet. App. at 8a.

On May 4, 1990 Conrail timely filed its Petition for Rehearing and Suggestion for Rehearing En Banc. The court of appeals denied the petition for rehearing on June 6, 1990. *Id.* at 50a.

REASONS FOR GRANTING THE WRIT

A.

1. The law of this Court is that antitrust cases should not go to trial unless the facts asserted by plaintiff, if proven, would show injury to competition, i.e., injury to consumers. In this case, the court of appeals ignored that doctrine and held that a firm's decision not to buy a component of its output at a price higher than its internal cost of producing the same component requires a judicial determination whether the decision was accompanied by competitive animus or would result in an "unreasonable" rate of increase in profits. That erroneous holding is plainly anticompetitive and requires review by this Court.

D&H and Conrail disagree over the share of revenue that D&H should receive when it provides joint services with Conrail that parallel services provided by Conrail alone. Conrail offered to buy D&H's service at a price equal to Conrail's own cost of such service. But D&H wanted more; it wanted to maintain the revenues it had received under a regulated scheme of inter-railroad subsidies that Congress and the ICC abandoned precisely because that scheme prevented railroads from being profitable, competitive and responsive to consumer demand.

Of course, under settled antitrust law, if Conrail's business practice is otherwise legitimate (and the court of appeals recognized it was), neither Conrail's alleged intent nor the degree of increase in profitability raises a genuine issue of material fact for trial. Neither bears on whether Conrail's offer would exclude competition or injure consumers. The effect of the decision below is

that the district court will have to abandon its role as an antitrust court and instead set itself up as a regulator to determine "fair" business practices and "reasonable" rates of increase in profits.

The court of appeals' decision requires review by this Court because (1) contrary to the antitrust laws and this Court's decisions thereunder, it holds that legitimate, efficiency-enhancing and nonexclusionary business practices may nevertheless be held unlawful, thereby chilling firms from undertaking such procompetitive practices; (2) it would impose significant costs on the economy by requiring vertically integrated firms to subsidize less efficient, non-integrated competitors (thereby frustrating the very purpose of the antitrust laws, which is to encourage vigorous competition among competitors); (3) it is contrary to the economic requirements of the troubled railroad industry and the uniform national regulatory system established by Congress to regulate railroad revenue division disputes and rate reasonableness; and (4) it conflicts with the decisions of this Court and with those of other circuits.

2. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985), this Court's most recent decision interpreting Section 2 of the Sherman Act,[20] the Court reserved the question "whether nonex-

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[20] Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolize. "The offense of monopoly under § 2 . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). D&H alleged, and the court of appeals found, a triable issue regarding attempt to monopolize. It is undisputed that conduct lawful for a monopolist cannot form the basis of an attempt claim. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); III P. Areeda & D. Turner, *Antitrust Law* ¶ 828a at 321 (1978). Accordingly, if the decision below is reversed with respect

clusionary conduct could ever constitute an abuse of monopoly power if motivated by an anti-competitive purpose." Similarly, in *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 118 n.12 (1986), the Court reserved the question "whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation."

This case squarely presents those issues. The district court found, and the court of appeals did not disagree, that Conrail's make-or-buy policy, which was uniformly applied to ensure procurement of a component of service from the lowest-cost source (either by supplying the service internally or buying it from D&H), maximized Conrail's profits. Yet, the court of appeals held that there was a triable issue on the basis of evidence it characterized as showing anticompetitive purpose. This case thus raises the question left open in *Aspen* and *Cargill*: whether a nonexclusionary practice coupled with alleged anticompetitive intent can ever constitute an abuse of monopoly power.

Of course, this question must be answered by reference to the underlying theory and purpose of the antitrust laws (*see Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987) (Kennedy, J.)), which is to benefit consumers, not to entrench or preserve inefficient competitors. *Atlantic Richfield Co. v. USA Pet. Co.*, 110 S. Ct. 1884, 1890-93 & n.7 (1990).[21] Thus, in *Aspen*,

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to the monopolization claim, it must also be reversed with respect to the attempt claim.

[21] In *Atlantic Richfield*, the court of appeals had reversed summary judgment for ARCO, holding that injury to a competitor was sufficient to establish a triable issue on injury to competition. *USA Pet. Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). This Court reversed the court of appeals, holding that a nonpredatory maximum pricing scheme can never exclude a rival unless the rival is relatively inefficient. 110 S. Ct. at 1891 n.7. If D&H were more efficient than Conrail, it had an opportunity to partici-

472 U.S. at 605, the Court held that the question whether conduct may properly be characterized as exclusionary cannot be answered by considering only its effect on competitors; to be held unlawful, the conduct must also impair competition (i.e., injure consumers), and it must do so on some basis other than efficiency.[22] Review is necessary to make clear that legitimate, nonexclusionary conduct can *never* constitute an abuse of monopoly power.

3. D&H's claim makes no economic or antitrust sense. It makes no economic sense because, as shown *supra* at 3, 5, 8 n.12, Conrail's make-or-buy analysis is the most efficient, cost-minimizing approach to the decision whether to provide service itself or to buy the same service from D&H. More generally, D&H's position, if upheld, would

pate in the joint service from which it claims to have been excluded. Here, there is no dispute, nor any allegation, that Conrail ever set its prices below its costs. Thus, D&H's relative inefficiency, not Conrail's pricing strategy, was the cause of D&H's alleged exclusion.

[22] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-98 (1986) (injury to plaintiffs irrelevant unless plaintiffs could also show that consumers would be injured by having to pay higher prices in the long run); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 (1984) (tying arrangement did not injure consumers and, accordingly, defendant was entitled to judgment as a matter of law; plaintiff's injury was irrelevant); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'" (emphasis in original; quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). *See also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 726-27 (1988) (refusing to apply *per se* rule in dealer termination case because there was no showing that termination, "without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output"); *Northwest Wholesale Stationers, Inc. v. Pacific Stationergy & Printing Co.*, 472 U.S. 284, 289, 295-96 (1985) (plaintiff's expulsion from a buying cooperative, "while certainly a restraint of trade," held lawful because it would not "characteristically be likely to result in predominantly anticompetitive effects," i.e., injury to consumers).

actually injure consumers: a firm required to purchase a component from a competitor at a price higher than the firm's own cost of producing the same component would either pass along its higher costs to consumers, or it would exit the marketplace, unable (because of those higher costs) to compete against other, efficient competitors. D&H's claim makes no antitrust sense because the make-or-buy policy, as a cost-minimizing, efficiency-enhancing practice, *cannot* injure consumers.[23]

Because D&H's claim makes no economic or antitrust sense, summary judgment is mandated. *Matsushita*, 475 U.S. at 587, instructs that an antitrust claim that "simply makes no economic sense" should not go to trial. This rule is necessary as a matter of both antitrust policy and judicial economy. "[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). As a matter of anti-

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[23] In response to the Canadian railroads' requests to reduce rates to meet truck competition, as the court of appeals found, "Conrail agreed to lower its rates on trips where it was the sole American carrier." Pet. App. at 4a. Thus, consumers, far from being injured, have benefited from Conrail's conduct. The divisions that D&H wants would not produce a still lower price to shippers. Rather, D&H is simply seeking to divert to itself the contribution that Conrail would otherwise earn if Conrail were to carry the traffic the entire route. In short, if D&H prevails, shippers will not pay less; if Conrail prevails, shippers will not pay more. Thus, the *only* issue raised by D&H's complaint is how the amount paid by the shippers for the U.S. portion of the transportation will be divided between Conrail and D&H, now that divisions are to be based on the free market rather than rigid regulation. That is of no concern whatever to the shippers, the receivers, the Canadian railroads or the antitrust laws. *See, e.g., Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir.) (utility's refusal to sell power to shopping mall developers for resale at retail rates did not violate antitrust laws because plaintiffs wished simply "to pre-empt [defendant's] business for their own profit, not as true competitors for the same market"), *cert. denied*, 449 U.S. 870 (1980).

trust policy, summary judgment is necessary to forestall meritless and vexatious claims that inhibit firms from maximizing efficiency and thereby promoting the interests of consumers. As a matter of judicial economy, summary judgment is one of "the principal tools by which factually insufficient claims . . .[can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

B.

In *Aspen*, this Court held that the question whether conduct may properly be characterized as exclusionary *cannot*, as a matter of law, be answered by simply considering its effect on competitors; rather, it must impair competition in an unnecessarily restrictive way, i.e., " '*on some basis other than efficiency*.' " 472 U.S. at 605 (emphasis added; quoting R. Bork, *The Antitrust Paradox* 138 (1978)).

The court of appeals misapplied *Aspen*. It acknowledged that the make-or-buy policy promoted efficiency—"profit maximization is a goal of the make or buy policy"[24] and, accordingly, "the policy is a legitimate practice" (Pet. App. at 7a)—but nevertheless held that the policy could be held unlawful based on evidence it characterized as showing anticompetitive intent. *Id.*[25]

This result, if allowed to stand, would frustrate antitrust policy by chilling countless firms throughout the

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[24] The evidence compels this conclusion. *See supra* at 9-10 & nn. 14-16.

[25] In *Aspen*, the Court concluded that the record supported a jury finding that Ski Co. had excluded on a basis other than efficiency in light of evidence that Ski Co. sacrificed short-term profits so as to eliminate its only competitor over the long run and that it lacked any other legitimate business justification for its conduct. 472 U.S. at 610. In this case, by contrast, short-term profit maximization was the express goal and undisputed effect of the challenged conduct.

economy from engaging in any number of similarly legitimate practices merely because their vigorous competition may subject them to the prospect of treble-damage antitrust liability. Moreover, the decision below conflicts with the decisions of other courts of appeals. Following *Aspen*, the First, Fifth, Seventh and Ninth Circuits have held that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent. In *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 473 (1990), the First Circuit affirmed a judgment notwithstanding the verdict where the challenged business policy lowered defendant's costs, even though there was record evidence both that plaintiff was injured and that defendant hoped its policy would injure plaintiff. *See also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231-32 (1st Cir. 1983).

The Fifth Circuit has held that, under *Aspen*, "the sufficiency of a legitimate business justification [may not be weighed] against the anticompetitive effects of a refusal to deal in order to find intent by a defendant to monopolize." *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988). Rather, the existence of a legitimate business justification has a "preclusive effect" against antitrust liability, even if there is anticompetitive intent. *Id.*

In *Olympia*, 797 F.2d at 373, 379, the Seventh Circuit held that Western Union was not required to subsidize competitors by having its salesmen promote their products, even though plaintiff (a competitor) was injured as a result. Further, evidence that Western Union intended that "these turkeys [i.e., plaintiff] . . . be flushed" by its conduct was deemed irrelevant. Similarly, in *A.A. Poultry Farms, Inc. v. Rose Acres Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326

(1990), the Seventh Circuit held that an objectively non-predatory pricing policy was lawful despite evidence that defendant hoped thereby to run plaintiff out of business.

And the Ninth Circuit has held that "the desire to maintain market power—even a monopolist's market power—cannot create antitrust liability if there was a legitimate business justification for" the challenged conduct. *Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 369 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988). On that basis, the court found lawful a monopolist's decision to forgo propane production for the benefit of a competitor despite evidence of anticompetitive intent, because such production would not have been "economically efficient" for the monopolist. *Id.* at 368.

Review is necessary both to resolve the conflict created by the decision below and to prevent the court of appeals' preoccupation with a company's alleged intent from chilling perfectly lawful conduct that the antitrust laws are intended to promote.[26] Legitimate, procompetitive business practices are *by definition* designed to take business away from rivals; there is nothing wrong with such a desire: "Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run." *Olympia*, 797 F.2d at 379. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.*

The court of appeals' use of "intent" as a barometer of anticompetitive conduct wrongly shifts the focus from

[26] Given the number and scope of companies subject to suit in the Second Circuit, the decision below will have a particularly deleterious effect on vigorous competition.

the actual effects on consumers to a necessarily subjective analysis of the state of mind of the defendant and its employees. But "the nature and consequences of a particular practice are the vital consideration, not the purpose or intent." III P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 76 (1978). Moreover, contrary to the very purpose of the antitrust laws, such an approach deters firms alleged to have monopoly power from engaging in legitimate, procompetitive practices by threatening them with treble-damage antitrust liability. *A.A. Poultry*, 881 F.2d at 1402.[27]

The court of appeals was plainly correct in recognizing that Conrail's profit-maximizing make-or-buy policy was "legitimate" (Pet. App. at 7a), both as a matter of settled antitrust law, which allows even monopolists to maximize profits,[28] and under the new scheme of deregulation established by Congress and the ICC.[29] Businesses every-

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[27] *A.A. Poultry* also accentuates why these issues should be resolved at the summary judgment stage: "Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation." 881 F.2d at 1402.

[28] *See, e.g., Ocean State Physicians*, 883 F.2d at 1111 & n.11 ("any buyer of goods or services . . . is lawfully entitled to bargain with its providers for the best price it can get"; "achieving lower costs is a legitimate business justification under the antitrust laws"); *Oahu Gas*, 838 F.2d at 368-70 (decision to limit output by forgoing propane production had a legitimate business justification because production would not have been "economically efficient"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296-98 (2d Cir. 1979) (lawful for firm with monopoly power to take actions to maximize profits), *cert. denied*, 444 U.S. 1093 (1980); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8th Cir.) (en banc) ("optimum monopoly pricing" policy a procompetitive, legitimate practice), *cert. denied*, 469 U.S. 872 (1984).

[29] The decision below would reverse this process of deregulation by returning to the regulated world of the old divisions among railroads—but with a difference. In the regulatory environment that

where use a make-or-buy analysis to determine whether to buy a component in the production process or to make it internally. Such an approach maximizes profits by minimizing costs; it is without doubt an efficiency-enhancing and therefore legitimate business practice that can only benefit customers.

C.

This case starkly evidences the dangers in applying the so-called "essential facilities" doctrine to profit-maximizing behavior, presenting an ideal opportunity for the Court to clarify and appropriately to limit the doctrine, which is "now loose in the lower federal courts." M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 397 (1986) ("Boudin").[30]

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preceded the 4R and Staggers Acts, the ICC was prospectively responsible for approving and otherwise monitoring the joint rates and divisions of railroads. Under the "new" regulatory environment created by the decision below, the "fair" and "reasonable" division between a railroad and its competitors will be determined retroactively in the courts, with the railroad subjected to treble-damage liability whenever a jury decides it does not like the railroad's pricing decision.

[30] This Court "has never acknowledged the essential facility doctrine." G. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U.L.J. 433, 480 (1987) ("Werden"). Although most essential facility cases in the lower courts invoke previous decisions of the Court, this Court's decisions "do not speak of [the doctrine] and can be explained without reference to it." P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 841 (1990) ("Areeda"). Indeed, "when one examines the Supreme Court decisions commonly cited for the doctrine by lower courts, they do not offer much support." Boudin, 75 Geo. L.J. at 398. Even in the lower courts,

> the cases support the [essential facilities] doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival. It is less a doctrine than an epithet . . . .

Areeda, 58 Antitrust L.J. at 841.

There is no standard formulation of the doctrine; a typical one is that "[a]ny company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them." *United States v. AT&T Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981).[31] The court of appeals applied a similar formulation. Pet. App. at 9a.

Such formulations render the essential facilities doctrine contrary to mainstream Section 2 law. Section 2 requires an analysis of the competitive effects of a decision not to deal, including a showing that defendant has monopoly power; even then, there is no duty to deal if there is an efficiency or other legitimate business justification for not dealing. Under the decision below (and other essential facilities cases), however, a company's efficiency-enhancing make-or-buy policy may be held unlawful solely because a factfinder might conclude that the policy could produce an "unreasonable" rate of increase in revenues. In addition, the essential facilities doctrine, as articulated by the court of appeals and other lower federal courts, dispenses with analysis of competitive effects.

This case thus squarely presents the question whether the essential facilities doctrine permits recovery that

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[31] The essential facilities doctrine has received much scholarly criticism. Professor Areeda argues that the doctrine "needs to be brought back to antitrust policy." Areeda, 58 Antitrust L.J. at 841. Boudin found that "most acute commentary rejects" the notion that "a monopolist controlling an essential facility has a duty to deal with competitors" because such a notion "would curtail efficiency or prove impossible to administer." Boudin, 75 Geo. L.J. at 401. Werden urges the courts to abolish the doctrine altogether. Werden, 32 St. Louis U.L.J. at 480. *See also* Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 Va. L. Rev. 1069 (1988) ("Note").

would otherwise be unavailable under Section 2. The effect of the decision below (and other essential facilities cases) is to give plaintiffs two opportunities for treble damages under Section 2, one under mainstream monopoly law and one under the essential facilities doctrine. There is no basis for this result; if plaintiff cannot show its entitlement to relief under conventional Section 2 law, it should not be allowed to escape the consequences of that inability by relying on the essential facilities doctrine.

This Court's previous decisions suggest that there is no difference between mainstream Section 2 law and the essential facilities doctrine: while the lower courts had decided *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *Aspen* under the essential facilities doctrine, this Court declined to do so and instead decided them under conventional Section 2 principles. *Otter Tail*, 410 U.S. at 377-78; *Aspen*, 472 U.S. at 611 n.44. Review is necessary to make clear what is only implicit in those decisions—that the essential facilities doctrine does not provide a loophole for a claim that would otherwise fail under Section 2.

1. The court of appeals held that there was a triable issue under the essential facilities doctrine as to the reasonableness of the make-or-buy policy in light of its belief that, as a result of implementation of the policy, Conrail's revenues would increase by 800% over some lines: "While it is difficult to extrapolate economic reasonableness from one case to another, we hold that a sudden price rise of 800% raises a genuine issue of material fact." Pet. App. at 10a.

This holding makes the essential facilities doctrine conflict with settled Section 2 law, which allows and indeed expects firms with monopoly power to charge profit-maximizing prices. *See supra* at 18-20 & n.28. This is true even if doing so entails a significant price increase (reflecting, in this case, Congress' decision to abandon a

regulatory scheme precisely because it yielded an insufficient return to the railroads). In addition, requiring Conrail to forgo the same contribution it would receive if it handled the shipments at issue itself would quite plainly force Conrail to subsidize D&H. In this respect, the court of appeals' holding is contrary to the well-established Section 2 principle that even a firm with monopoly power need not give a competitor a "free ride" by subsidizing the competitor's business. *Olympia*, 797 F.2d at 377.[32]

In addition to departing from settled Section 2 law in holding that there was a triable issue whether Conrail's make-or-buy policy is "reasonable" under the essential facilities doctrine, the court of appeals also misapplied summary judgment principles. There is no evidence *in the record* to support its finding of "a sudden price increase of 800%." That number was derived entirely from a *hypothetical* used by the district court to illustrate how the make-or-buy policy works (Pet. App. at 22a & n.7) and was neither drawn from nor supported by the record. The fact that a purely hypothetical application of the make-or-buy policy, using hypothetical numbers, would result in substantial increases in Conrail's revenues for one particular movement does not create a genuine issue of material fact for trial. "It is the record made on summary judgment that controls, not that record plus speculative inferences a trier of fact might add." *Richards*, 810 F.2d at 902. The court of appeals' hold-

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[32] Other courts of appeals have followed these Section 2 principles in rejecting essential facilities claims. In *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081, 1088 (7th Cir. 1990), the Seventh Circuit held that "Illinois Bell's business decision to switch from cost-based pricing to market-based pricing" for listing information was a "legitimate business" decision, not an unreasonable denial of an essential facility. *See also Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988) (limiting access to stadium to one trade show per year to highest bidder not unreasonable denial of essential facility).

ing is not supported by the record, but rests on no more than a "metaphysical doubt" of the sort this Court has held to be insufficient. *Matsushita*, 475 U.S. at 586. Therefore, summary judgment is appropriate.

2. The court of appeals assumed that Conrail's tracks from the D&H interchange to the ultimate destination constituted an "essential facility" on the ground that physical duplication of Conrail's lines would be impractical from D&H's standpoint. *See* Pet. App. at 9a. The consequences of this assumption are dramatic. Most shipper locations are served by only one railroad so that, under this assumption, the tracks from the shipper's location to the first interchange and from the last interchange to the ultimate destination will always constitute an "essential facility." Under this approach, there will be literally tens of thousands of such "essential facilities."

This approach, which is similar to that taken by other lower courts in determining that a facility is essential by reference to competitors and not competition,[33] creates an unsupportable distinction between the essential facilities doctrine and settled Section 2 law. Under Section 2 law, a duty to deal is not imposed unless (1) a firm is found to have monopoly power and (2) "some cooperation" between the monopolist and its competitors "is indispensable to effective competition." *Olympia*, 797 F.2d at 379.

More recent cases considering essential facilities claims have properly focused on whether forcing access to a facility is necessary for competition and to promote consumer interests. *E.g.*, *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1033 (7th Cir.), *cert. denied*, 109 S. Ct. 261 (1988); *Mid-South Grizzlies v. Na-*

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[33] *E.g.*, *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

tional Football League, 720 F.2d 772, 779 (3d Cir. 1983) (NFL franchise not an essential facility to which a would-be entrant was entitled, because adding another football team would not have increased competition or lowered prices; it would simply have permitted one more team to share television revenues), *cert. denied*, 467 U.S. 1215 (1984). Plainly, the approach taken in *Flip Side* and *Mid-South* is consistent with the fundamental purpose of the antitrust laws to benefit consumers, not to protect individual competitors.[34]

In this case, the court of appeals dispensed with the traditional Section 2 requirement that sharing the "essential facility" under the terms demanded by plaintiff be indispensable to effective *competition*. Instead, it held that Conrail, when it is the only railroad serving the destination, could be required to set its price at a less-than-profit-maximizing rate, even though doing so would not reduce price to the consumer or increase output. At best, sharing under the terms demanded by D&H would have absolutely no effect on either consumers or competition.[35] As with plaintiffs in *Mid-South* and *Alemeda Mall*

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[34] "A single firm's facility . . . is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace." Areeda, 58 Antitrust L.J. at 852. The mistake in focusing on whether a facility is essential to a particular competitor is that "[s]uch a focus provides little or no guide for parsing efficient and anticompetitive behavior. * * * [I]n evaluating the desirability of a duty to deal in [essential facility cases], the test should be consumer welfare." Note, 74 Va. L. Rev. at 1093, 1071. Moreover, "[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. *Such an improvement is unlikely . . . when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains.*" Areeda, 58 Antitrust L.J. at 852 (emphasis added).

[35] CN and CP proposed rate reductions to meet truck competition. D&H's own expert opined that trucks had captured as much as 25% of the newsprint transportation at issue. There is no

(*see supra* n.23), D&H is simply trying to "substitute itself" for Conrail so as to "share" in Conrail's profits.

3. The court of appeals' view of the essential facilities doctrine, if accepted, raises problems that are beyond the ability of the antitrust laws or the courts to solve. *First*, the district court found that the price Conrail offered for D&H's participation was efficient, and the court of appeals did not disagree. *See supra* at 9-10. The court of appeals thus held that there are aspects of an efficient, non-exclusionary price that are subject to antitrust review, on the basis of non-efficiency factors, for "reasonableness." But neither the court of appeals nor, to our knowledge, any other court has set forth any standards for determining when an efficient price is "unreasonable." [36] Thus,

> it is not clear at all whether a monopolist may engage in hard bargaining to reach the arrangement most favorable to itself, or whether it may simply refuse an unreasonable request for access. When negotiations over access fail to produce an agreement, it is unclear how blame is to be assessed and potential liability determined.

Werden, 32 St. Louis U.L.J. at 456. The decision below will necessarily cause firms that are willing to deal with their competitors to avoid price negotiation for fear that, as in this case, negotiation to obtain a profit-maximizing price may result in treble-damage claims. Such a result would be contrary to the purpose of the antitrust laws, which is to promote vigorous competition.

Second, on remand to decide whether the make-or-buy policy is reasonable, the factfinder will necessarily have to determine both a reasonable price for access and

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evidence that D&H's presence was essential to maintaining competition for newsprint traffic.

[36] Rate reasonableness determinations are the province of regulatory agencies. *See infra* at 28-29.

what level of profitability to permit Conrail. Moreover, if Conrail's profit-maximizing price, while legitimate (in the court of appeals' view), is found to be "unreasonable," "the reasonable" price will have to be fixed retrospectively in order to measure D&H's alleged damages and establish the conditions under which Conrail must permit D&H to earn its subsidy.

This will be the first case in which such issues will be decided in a private antitrust suit.[37] "The federal courts . . . are not well equipped to set a 'fair price.' " *Consolidated Gas*, 665 F. Supp. at 1512. In *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 (6th Cir. 1979), the Sixth Circuit stated that, in the absence of a regulatory agency to "obviate problems of judicial price setting . . . the difficulty of setting a price at which the monopolist must deal might well justify withholding relief altogether." *Accord* Areeda, 58 Antitrust L.J. at 853 ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.").

Judicial consideration of these complex issues would also frustrate Congress' desire to have a *uniform* na-

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[37] To be sure, other courts have imposed a duty to deal (*e.g.*, *MCI*, *Otter Tail*, *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir.), *vacated and reh'g granted*, 889 F.2d 264 (11th Cir. 1989)), but each of those cases left the ultimate price determination to the relevant regulatory agency. Here, Conrail has offered to buy D&H's participation; the *sole* issue is price. The only aspect of that issue that is pertinent to an antitrust court's responsibility is whether the price is efficient (i.e. non-exclusionary), not whether it is otherwise "reasonable." The latter issue is for regulatory agencies. In this case, the ICC has already spoken to the rate reasonableness issue. It has eschewed non-efficiency factors and has approved make-or-buy pricing, finding that such pricing is *not* anticompetitive. *See supra* at 7-8.

tional railroad policy.[38] Conrail operates throughout the midwest and northeastern United States. The court may on remand decide the "fair" and "reasonable" profit level for Conrail in its dealings with D&H in the market here at issue. But a court in Chicago may someday have its opportunity to decide what is fair and reasonable and, still later, one in Pittsburgh may get its chance. Such a result is plainly irrational; no business could possibly operate in such an environment.

The antitrust laws are not concerned about whether Conrail's rates are "fair" or "reasonable." *If* Conrail truly has market dominance and *if* its rates truly are not "reasonable" or "fair," then the ICC is the appropriate body to determine what is "fair" and "reasonable". *See* 49 U.S.C. § 10701a.[39] Congress has chosen the ICC—not antitrust courts—to regulate rate reasonableness. Neither the "essential facilities" doctrine nor traditional Section 2 law gave the court of appeals authority to override that congressional determination.

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[38] D&H itself recognized the danger of judicial interference with the regulatory scheme designed by Congress in opposing Conrail's motion (based on primary jurisdiction principles) to dismiss or stay the litigation. Conrail had argued that D&H's claims created the potential for conflict between antitrust law and regulatory policy and requested that the court allow review by the ICC to obviate the possible conflict. D&H sought to allay any fears of such a conflict by unequivocally asserting that its complaint created "no potential for conflict between the regulatory and antitrust regimes because D&H is *not* challenging the reasonableness of Conrail's rates and charges or whether they are in the public interest," matters "entrusted to the ICC." Memorandum of Law of Delaware and Hudson Railway Company in Opposition to Motion to Dismiss the Complaint (filed Nov. 14, 1988) at 23-24 (emphasis supplied).

[39] The court of appeals was flatly wrong in its apparent assumption that deregulation had "left to the railroads" all decisions regarding joint rates. Pet. App. at 3a.

CONCLUSION

For the foregoing reasons, Conrail's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 4, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1123, Docket 89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Appellee.

Argued April 4, 1990

Decided April 20, 1990

James K. Manning (Elizabeth Storch, and Brown & Wood, New York City on the brief) for appellant Delaware & Hudson Ry. Co.

Thomas E. Zemaitis, Philadelphia, Pa. (Laurence Z. Shiekman, Stephen J. Cipolla, Michael A. Ceramella, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., Scott A. Barbour, and McNamee, Lochner, Titus & Williams, Albany, N.Y., Bruce B. Wilson, Constance L. Abrams and Consol. Rail Corp., Philadelphia, Pa., on the brief) for appellee Consol. Rail Corp.

Before FEINBERG, TIMBERS and WALKER, Circuit Judges.

TIMBERS, Circuit Judge:

Appellant Delaware & Hudson Railway Co. ("D & H") appeals from a summary judgment entered Novem-

ber 20, 1989 in the Northern District of New York, Neal P. McCurn, *Chief Judge,* in favor of appellant Consolidated Rail Corp. ("Conrail") in this antitrust action. 724 F.Supp. 1073 (N.D.N.Y.1989).

The district court found that D & H failed to raise a genuine issue of material fact with respect to any of its three claims, viz. monopolization, denial of an "essential facility" and attempted monopolization. On appeal, D & H asserts as error the district court's rejection of each of these three claims. It asserts that the court misconstrued the applicable law and, contrary to the approved practice at the summary judgment stage, failed to draw proper factual inferences in its favor.

After careful consideration, we hold that D & H's contentions are meritorious. For the reasons which follow, we vacate the judgment of the district court and remand the action.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

A brief overview of recent developments in the freight railroad industry may help to place this dispute in context. Conrail was organized in the early 1970's in an effort to preserve the viability of freight transportation by rail in the northeastern and midwestern United States. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 108-09 (1974). Several large railroads, including the giant Penn Central, had become insolvent. Congress saw as the solution a single system run on a for-profit basis. *Id.* Subsequently, Conrail absorbed still more insolvent railroads.

D & H is a much older and smaller system than Conrail. It controlled about 1,700 miles of track at its peak, while Conrail controls about 17,000. Conrail does not challenge the fact that, as a result of the disparity, D &

H is forced to rely on Conrail's system in order to compete. In the market involved on this appeal—shipment of newsprint from eastern Canada to locations in the mid-Atlantic states of this Country—only Conrail can provide transport from start to finish in most instances.

An example used by the district court and by both parties in their briefs may illustrate the parties' relationship: A newsprint shipper seeks to have newsprint delivered from a point in Quebec, Canada, to Lancaster, Pa. There are two relevant options. One option would entail delivery via a Canadian railroad to Conrail's border facility. Conrail then would carry the cargo on its tracks for the entire journey. Under the other option, after receiving the cargo at its border facility, D & H would carry the cargo on its tracks only as far as Harrisburg, Pa. From there, it would have to complete the journey on Conrail's tracks.

Most of D & H's newsprint shipments therefore require the cooperation of Conrail. That cooperation takes the form of "joint rates". A joint rate is a cooperative rate—less than the sum of the separate rates of the individual railroads—charged to the shipper when the shipment requires the use of the tracks of two or more railroads. Each railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks.

Until 1980, the Interstate Commerce Commission required cooperation in the setting of joint rates. In that year Congress moved to deregulate the railroads. The Staggers Rail Act of 1980, 49 U.S.C. § 10101 *et seq.* (1988), left to the railroads the decision whether or not to cooperate, albeit subject to antitrust and other laws. H.R.Conf.Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin.News 3978, 4110, 4114.

The dispute leading to this appeal arose when Canadian shippers and railroads sought to lower rates so that

rail carriage of newsprint could compete more readily with carriage by truck. Conrail agreed to lower its rates on trips where it was the sole American carrier. It did not decline outright to cooperate in cases where it was the secondary ("short haul") carrier to D & H, but instituted a policy, called "make or buy", that achieved the same effect. Under that policy, Conrail would agree to the reduced rate only if its profit, called "contribution", matched its profit on the route where it was the sole carrier.

The effect of the make or buy policy can be demonstrated by reference to the example referred to above. On a Quebec-Lancaster carriage entirely on Conrail tracks, Conrail would earn $30,000 in revenue, less $20,000 in costs, for a contribution of $10,000. Prior to the make or buy policy, Conrail's revenue for the Harrisburg-Lancaster short haul route, when D & H was responsible for the long haul, would be $2,000, less costs of $750, for a contribution of $1,250. The make or buy policy was intended to assure that Conrail would receive the same contribution for any carriage in which it participated, whether it was the short or long haul carrier. Accordingly, under its new policy, Conrail demanded a contribution of $10,000 for the Harrisburg-Lancaster short haul route, an increase of 800%. The price for D & H's failure to agree to those terms was the denial by Conrail of any joint rates.

Conrail's action placed D & H in a bind between giving up almost all of its profits on a given route and losing entirely the ability to carry freight on the route. It decided not to concur in joint rates where the make or buy policy was in effect. It commenced the instant action in July 1986. In June 1988, D & H sought protection under Chapter 11 of the United States Bankruptcy Code.

After surviving a motion to dismiss, 654 F.Supp. 1195 (N.D.N.Y.1987), and after extensive discovery, D & H's antitrust claims were rejected by the district court on

Conrail's motion for summary judgment. The three claims, all of which relate to the same product market (shipment of newsprint from eastern Canada to the mid-Atlantic states) and the same conduct (Conrail's make or buy policy), are those set forth in the second paragraph of this opinion.

From the summary judgment rejecting these claims, this appeal was taken by D & H which asserts that, since there are genuine issues of material fact with respect to the three claims, summary judgment was improper. We agree.

II.

On an appeal from a summary judgment, we review the record de novo to determine whether there are genuine issues of material fact. Fed.R.Civ.P. 56(c). We assess the record in the light most favorable to the non-movant and we draw all reasonable inferences in its favor. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2 Cir.1989). The non-movant, however, who must sustain the ultimate burden of proof, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Conclusory allegations will not suffice to create a genuine issue. There must be more than a "scintilla of evidence," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

III.

We turn first to the question whether the make or buy policy constituted the offense of monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2 (1988). To establish the defendant's liability, the plaintiff must demonstrate "(1) the possession of monopoly power in the relevant

market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

(A)

Addressing the second element first, we must affirm the district court's ruling unless D & H has demonstrated that there is a genuine issue of material fact as to whether Conrail's make or buy policy constituted willful anti-competitive conduct in the relevant newsprint transportation market. Conrail's most significant contention in this regard is that, since the policy was intended to increase short-term, as well as long-term, profits, Conrail is insulated from liability.

Conrail finds support for this contention primarily in two opinions. The first is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). There the Court affirmed a decision that the defendant had engaged in actionable conduct in its refusal to continue cooperating with a competitor. The Court held that a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification. *Id.* at 605. In determining that there was no valid justification, the Court found significant the fact that the defendant "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. Conrail infers from *Aspen Skiing* that conduct which has profit maximization as a goal cannot violate § 2.

Conrail finds further support for this contention in *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir.1988). There, we approved a jury instruction which included the following:

> "[A] monopolist is under no duty affirmatively to help or aid its competitors and is free to set as its legitimate goal the maximization of its own profits *so long as it does not exercise its power to maintain that* [*monopoly*] *power.*"

Id. at 1361 (emphasis added).

The plain language of the above excerpt from *United States Football League* demonstrates that Conrail's contention is incorrect. The fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, but does not shield the policy from judicial scrutiny. A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits. *Aspen Skiing* does not hold to the contrary.

Our review of the record in the instant case satisfies us that there is evidence which would support a jury finding that Conrail is liable for monopolization. Here are a few examples: First, James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits. Second, several Conrail employees, including its President, Stuart M. Reed, stated that a shift of D & H's traffic to Conrail would be desirable. Third, David Kalapos, an analyst for Conrail, stated that D & H would be unlikely to concur in a joint rate under the make or buy policy as its profits "would be almost ludicrously low." Fourth, there is no question that D & H was harmed by the implementation of the policy. D & H introduced in evidence a letter from a Conrail vice president stating "I'm for a monopoly in total! . . . So let's Conrail take and rationalize the entire D & H."

We agree with the district court that the vice president's letter, standing alone, would not give rise to a § 2 violation. *Ocean State Physicians Health Plan v. Blue*

Cross & Blue Shield of R.I., 883 F.2d 1101, 1113 (1 Cir.1989), *cert. denied*, 110 S.Ct. 1473 (1990); *Olympia Equipment Leasing Company v. Western Union Tel. Co.*, 797 F.2d 370, 373, 379 (7 Cir. 1986) (intent that "these turkeys . . . be flushed" did not give rise to liability), *cert. denied*, 480 U.S. 934 (1987). In view of the evidence referred to above, however, we hold that D & H has proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated § 2. Obviously, therefore, this issue could not properly be decided against D & H on a motion for summary judgment.

(B)

The district court assumed for purposes of argument that Conrail had monopoly power in the relevant market, transportation of newsprint from eastern Canada to the mid-Atlantic states. Conrail now asserts as an alternative ground for affirming the district court that this assumption was incorrect: D & H's evidence on the subject, it contends, was insufficient to create a triable issue.

D & H's expert witness, Gordon Fay, stated in an affidavit that Conrail had two-thirds of the market in rail transportation of newsprint and one-half of the total market (including truck transportation). While market share is not the sole factor in the determination of market power, it is a highly significant one. *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 128 (2 Cir.), *cert. denied*, 454 U.S. 968 (1981).

The parties and the district court seem not to have devoted significant attention to the question of monopoly power. Conrail did not even take the deposition of the witness Fay. We are not presented with a well-developed record on that question. Nevertheless, on the record before us, we are persuaded that D & H has presented a genuine issue of material fact as to monopoly power, precluding summary judgment in favor of Conrail on this issue.

IV.

We turn next to the question whether the make or buy policy constituted denial of an essential facility and, by implication, a violation of § 2. The alleged essential facility is Conrail's tracks used for short haul routes, e.g., the Harrisburg-Lancaster tracks in the hypothetical Quebec-Lancaster run. The district court rejected D & H's claim, relying on the four-factor test set forth in *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7 Cir.) ("(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."), *cert. denied*, 464 U.S. 891 (1983); *see also Twin Laboratories, Inc. v. Weider Health & Fitness*, No. 89-7972, slip op. at 2898 (2 Cir. April 9, 1990) (applying *MCI*).

There is no question that Conrail controls the short haul tracks, thus satisfying the first element. With respect to the second element, we agree with the district court's statement that "physical duplication of [Conrail's] lines would be an impractical and unreasonable project to undertake." 724 F.Supp. at 1079. The fourth element, feasibility, is demonstrated by the fact that D & H was permitted continuous use of the tracks until the make or buy policy foreclosed that use.

The third element—whether Conrail impermissibly denied to D & H the use of the tracks—is the one on which the district court based its decision. The court held correctly that there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable. In this context the following passage is particularly appropriate:

> "Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner,

> upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."

United States v. Terminal Railroad Assoc., 224 U.S. 383, 411 (1912); *see also* Areeda & Hovenkamp, Antitrust Law ¶ 736.1, at 700-01 (1989 Supp.).

We disagree, however, with the district court's conclusion that the terms of the make or buy policy were reasonable as a matter of law. We return to the earlier illustration to make the point clear. Prior to the implementation of the policy, Conrail received a contribution of $1,250 for D & H's use of its Harrisburg-Lancaster tracks. Under the policy, Conrail demanded a contribution of $10,000, an increase of 800%. The magnitude of that increase may be sufficient in itself to create a triable issue as to whether the terms were unreasonable. Whether it is or is not, however, the various statements of Conrail executives, excerpted above, support our conclusion that there is a triable issue.

The relatively sparse case law on this question supports our conclusion. In *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F.Supp. 1309 (D.Md.1989), the court found that the defendant's offer to transport cargo for $.01 per ton above the defendant's own variable cost was reasonable. *Id.* at 1323-24. While it is difficult to extrapolate economic reasonableness from one case to another, we hold that a sudden price rise of 800% raises a genuine issue of material fact under *Laurel Sand*.

We need not determine on this appeal the circumstances under which a legitimate business practice will shield a defendant from liability for conduct that otherwise would constitute denial of an essential facility. *MCI*, *supra*, 708 F.2d at 1133 (suggesting that a legitimate practice may serve as a shield from liability). In

our discussion above on the monopolization claim, we held that there is a genuine issue of material fact with respect to the question whether the make or buy policy was a legitimate practice. That holding is equally applicable here.

V.

D & H also contends that the make or buy policy constituted the § 2 offense of attempted monopolization. To make out a successful claim of attempted monopolization, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power. *International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790 (2 Cir.), *cert. denied*, 482 U.S. 915 (1987). These elements essentially track those required for a successful monopolization claim. We held with respect to the monopolization claim that the development and implementation of the make or buy policy raised triable issues on the questions of conduct and intent. Likewise, evidence of Conrail's monopoly power that is sufficient to withstand a motion for summary judgment also suffices to raise a triable issue as to whether there was a dangerous probability that Conrail would obtain monopoly power.

VI.

To summarize:

We hold that there are genuine issues of material fact with respect to whether the development and implementation by Conrail of its make or buy policy constituted the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization.

Nothing in this opinion is to be construed as an expression of our views on the merits of the issues to be tried. All we hold today is that there are genuine issues of material fact which should not be decided by summary judgment.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April, one thousand nine hundred and ninety.

Present: HON. WILFRED FEINBERG
HON. WILLIAM H. TIMBERS
HON. JOHN M. WALKER, JR.
Circuit Judges,

89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Appellant,

-v.-

CONSOLIDATED RAIL CORPORATION,
Appellee.

Appeal from the United States District Court
for the Northern District of New York

[Filed Apr. 20, 1990]

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said District Court in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro,
EDWARD J. GUARDARO,
Deputy Clerk

MANDATE: June 19, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

86-CV-810

DELAWARE & HUDSON RAILWAY COMPANY,
Plaintiff,

-v-

CONSOLIDATED RAIL CORPORATION,
Defendant.

Appearances:	Of Counsel:
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NEAL P. MCCURN, C.J.

MEMORANDUM-DECISION AND ORDER

[Filed Nov. 17, 1989]

In *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 654 F.Supp. 1195 (N.D.N.Y. 1987), this court denied Consolidated Rail Corporation's ("Conrail's") motion to stay or dismiss the plaintiff's complaint pursuant to the

doctrine of primary jurisdiction.[1] *Id.* at 1203. In this proceeding, Conrail moves for summary judgment against the plaintiff, Delaware & Hudson Railway Company ("D & H"). For the reasons stated below, defendant's motion for summary judgment is granted.

Background

Familiarity with this case is presumed, and the following is based primarily on the background presented in *Del. & Hudson Ry. Co.*, 654 F.Supp. 1195, 1197-98 (N.D.N.Y. 1987).

D & H is a Delaware corporation which provides rail transportation services throughout the mid-Atlantic region.[2] Conrail is a Pennsylvania corporation, established pursuant to the Regional Rail Reorganization Act of 1973, Pub.L.No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. § 741). Conrail was organized by Congress in part because of the collapse of regional railroads in the 1970's. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Conrail provides rail transportation services to both the Northeast and the Midwest.

D & H and Conrail are competitors. However, because of the nature of the railroad business, railroads jointly participate in the use of rail facilities, since no one railroad can provide service to every shipper location in the United States.

To enable railroads to provide national service, railroads participate in "through routes", which are business arrangements made between two or more railroads where

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[1] Conrail sought a stay or dismissal of the plaintiff's complaint, so that the Interstate Commerce Commission could consider D & H's claims prior to this court's determination.

[2] Since the commencement of this lawsuit, D & H has filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101.

they agree to move freight in continuous carriage between the origin on one railroad and the final destination on another. Railroads also operate "single line routes". On a single line route, the entire railway, from origin to destination, is owned by one railroad. Larger railroads, such as Conrail, own many of these single line routes. Smaller railroads, such as D & H, often must interconnect with the larger railroads, via through routes, to provide service to major metropolitan areas.

Competition between different companies is affected, to an extent, by regulations that railroads must follow. Prior to the late 1970's, price competition between railroads was considered to be unhealthy for both the railroad industry and the consumer. Consequently, the establishment and regulation of rates was the province of the Interstate Commerce Commission ("I.C.C."). This situation changed with the passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 ("Staggers Act"). The Staggers Act was enacted in order to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a(1). Among other changes resulting from this Act, the Staggers Act stripped the I.C.C. of all jurisdiction to review rates and charges except in limited circumstances. *See* 49 U.S.C. §§ 10701a and 10709.

In October 1982, Conrail implemented a rail-rate policy in order to maximize its profits. This rate-making policy, known as Conrail's "make or buy" policy, is central to the instant dispute. D & H alleges that this policy is exclusionary and unlawful in its implementation, while Conrail asserts that the make or buy policy is a legitimate, profit-maximizing program.

D & H has sued Conrail, alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). D & H

claims that Conrail has monopolized, and attempted to monopolize, the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states.[3] D & H claims that certain policies of Conrail, in particular Conrail's make or buy policy, are anti-competitive. Conrail has moved for summary judgment on all claims against D & H.

DISCUSSION

1. The monopolization claim.

(a) Elements

For D & H to successfully prove a violation of the Sherman Antitrust Act, it must meet the requirements stated in *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966). The Supreme Court held that:

> (t)he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Grinnell at 570-71, 86 S.Ct. at 1704.

The first step in a court's analysis of a claim involving alleged monopolization is a definition of the relevant markets. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979), *citing United States v.*

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[3] The plaintiff, at oral argument, conceded that the relevant market here is one which is much narrower than the market it alleged when it originally brought this lawsuit. Both sides agree, for purposes of this motion, that the market defined by D & H, which Conrail is alleged to have monopolized, and attempted to monopolize, is the aforementioned market.

E.I. du Pont [de] Nemours & Co., 351 U.S. 377, 391-93, 351 S.Ct. 994, 1005-06 (1956).[4]

A determination of the relevant market in an antitrust claim requires inquiry into both the nature of the product, *E.I. du Pont*, 351 U.S. at 391, 351 S.Ct. at 1004-05, and the geographical area in which the alleged illegal conduct took place. *Grinnell*, 384 U.S. at 575-76, 86 S.Ct. at 1706. *See also Oahu Gas Service Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 364 (9th Cir. 1988).

For purposes of this motion, both parties agreed, at oral argument, that the relevant market is the transportation of newsprint from Eastern Canada to the mid-Atlantic states. As a result of this narrow market definition, many of the claims against Conrail in D & H's complaint, including claims pertaining to Conrail's reciprocal switching rates, have been abandoned and are no longer an issue before this court.

While Conrail alleges that it does not possess monopoly power in the relevant market, since this court finds that the second element of an antitrust violation has not been proven by the plaintiff, the court will presume, for purposes of this motion, that Conrail does have monopoly power in this market.

The mere existence of monopoly power is not a violation of the Sherman Act. Rather, "the offense of monopolization under Section 2 of the Sherman Act requires proof of monopoly power . . . plus conduct designed to maintain or enhance that power improperly." *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 373 (7th Cir. 1986), *citing United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04

[4] The plaintiff bears the burden of establishing the relevant market in a monopolization claim. *Walker Process Equipment Co. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-78, 86 S.Ct. 347, 350-51 (1965), *Neumann v. Reinforced Earth Co.*, 786 F.2d 429 (D.C. Cir. 1986).

(1966), *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 457 U.S. 585, 596 n.19, 105 S.Ct. 2847, 2854. (1985)[5]

In determining whether a plaintiff has satisfied the second *Grinnell* requirement, the *Aspen* court held that proof of a general intent to monopolize was necessary to establish a Section 2 Sherman Act claim. *Id.* 457 U.S. at 602, 105 S.Ct. at 2857. In proving this intent on the part of Conrail, the plaintiff offers a memorandum of John H. Williams, Conrail's former assistant vice-president in charge of strategic analysis and planning. In this memo, written to Richard B. Hasselman, Conrail's Senior vice-president for operations, Williams said, concerning D & H, "I'm for a monopoly in total! . . . So lets Conrail take and rationalize the entire D & H."

This is relatively clear proof of Conrail's monopolistic intent. However, "the desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws". *Ocean State Physicians Health Plan, Inc. v. Blue Cross* 883 F.2d 1101, 1113 (1st Cir. 1989).

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[5] *See* Von Kalinowski, *Antitrust Laws and Trade Regulation,* vol. 3, § 8.02(4) (Bender 1989), where it is noted that:

> Under Section 2, actual monopolization consists of the power to control prices or exclude competition, coupled with "the purpose or intent to exercise that power for anticompetitive or exclusionary purposes."

See also Sullivan, *Antitrust,* § 36 (West 1976), where, in differentiating between permissible and exclusionary conduct on the part of an organization, it is stated that

> First, [the exclusionary conduct test] should discriminate between conduct which is harmful in some economic sense, and conduct which is not; second, it ought to discriminate between alternative courses of action in the marketplace in a manner which would be meaningful to an actor there, so that those whose conduct the law would shape can be guided in meaningful ways; third, it should not ban conduct which is no more than the normal, rational response of a business manager seeking to maximize profits, sales, or revenues.

A monopolist is not prohibited from engaging in business transactions merely because it is a monopolist. Thus, in *U.S. Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), this circuit recently upheld the following jury instruction:

> A monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers.

Id. at 1361. *See also Ocean State*, where the court noted that "Section 2 does not prohibit competition on the part of a monopoly. To the contrary, the primary purpose of the antitrust laws is to encourage competition." *Id.*, 883 F.2d at 1110 (citations omitted).

Nor is a monopolist required to engage in business transactions without taking into account how such transactions would affect the monopolist's business. Accordingly, in *Aspen* the Supreme Court approved the following jury instruction:

> a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, than the defendant, even if he is found to possess monopoly power in the relevant market, has not violated the law.

Id., 457 U.S. at 597, 105 S.Ct. 2854.

Thus, the issue before this court is whether Conrail's make or buy policy was a legitimate business practice, and therefore not violative of Section 2, or whether this program was exclusionary and therefore impermissible under the Act. Accordingly, an examination of this policy is appropriate.

(b) The make or buy rail-rate policy.

In 1982, Conrail instituted what it refers to as its make or buy rail-rate policy. Under this program, Conrail informed D & H that it would concur in rates proposed by D & H over short haul routes as long as Conrail received the same contribution [6] that it would receive if Conrail carried the freight by itself along one of it's own long haul routes.

Conrail offered the following example as illustrative of this policy: A Canadian rail carrier sought to offer a rate to a shipper in Quebec, Canada concerning the transportation of paper from Quebec to Lancaster, Pennsylvania, a point served only by Conrail. This freight could be transported over several possible through routes. One route would be from the shipper's location in Quebec over the Canadian carrier, to D & H at Rouses Point, New York, for interchange with Conrail at Harrisburg, Pennsylvania, and for final delivery by Conrail to the consignee at Lancaster. Alternatively, the paper could be delivered from its place of origin to Conrail's station in Quebec, where Conrail could then directly carry the freight to the consignee in Lancaster, Pennsylvania.

The Canadian carrier contacted both D & H and Conrail, and sought to establish an equal joint rate for each route. Conrail did not concur in the joint rate proposal concerning the route involving D & H, because in the D & H/ Conrail route, Conrail would have received less contribution than it would had Conrail carried the freight by itself.

D & H alleges that Conrail's refusal to concur in joint rates such as the aforementioned is exclusionary. The plaintiff argues that since it would cost Conrail less money to participate in rates with D & H, rather than

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[6] Contribution is the revenue that a carrier receives for moving freight over part of a route, less the costs associated with that movement.

for hauls involving Conrail alone, Conrail's refusal to concur is anticompetitive conduct. This contention is incorrect. Of course, it would cost Conrail more money to haul the paper from Quebec to Lancaster than it would had Conrail chosen to transport it only from Harrisburg to Lancaster. However, the contribution Conrail would have received for hauling the paper from Harrisburg would have been significantly less than the contribution it would have obtained for transporting the paper from Quebec to Lancaster.[7] Conrail's profits are directly tied to the contribution it receives, so as the overall contribution it collects increases, so does Conrail's potential for profits. It therefore would have been unprofitable for Conrail to concur in joint rates with D & H in situations where it would have received more contribution if Conrail, alone, carried the freight. A monopolist is not required to engage in practices which are less profitable than other, legitimate practices. *U.S. Football League*, 842 F.2d at 1361.[8]

The plaintiff claims that Conrail's make or buy policy is the "exact counterpart" of the conduct of the defendant in *Aspen*, where the defendant's conduct was found to violate section 2 of the Sherman Act. However, this is not the case. In *Aspen*, the Court found that it would be logical for a jury to conclude that:

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[7] For example, if it cost Conrail $20,000 to carry paper from Quebec to Lancaster, and it was offered $30,000 to transport the paper by a Canadian company, Conrail would receive a contribution (or profit) of $10,000. Had it cost Conrail $750 to carry the paper from Harrisburg to Lancaster in a joint rate proposal with D & H, and it was paid $2,000, it would have only received a $1,250 contribution.

[8] In *U.S. Football League*, the second circuit approved a jury instruction which stated, *inter alia*, that:

> a monopolist is under no duty to help or aid its competitors *and is free to set as its legitimate goal the maximization of its own profits* so long as it does not exercise its [monopoly] power to maintain that power (emphasis added).

> [the defendant] Ski Co. elected to forgo . . . short run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor.

Id. 472 U.S. at 608, 105 S.Ct. at 2860. The Court also found that the defendant "was willing to sacrifice short run benefits and consumer goodwill" in order to harm its competitor in the long run. *Id.* at 610-11, 105 S.Ct. at 2861. In the instant case, D & H has failed to proffer evidence of a similar sacrifice on the part of Conrail. The plaintiff has not provided this court with one instance where Conrail refused to concur in join rates with D & H where concurrence with D & H would have been more profitable for Conrail than non-concurrence.

Thus, D & H has failed to show how this make or buy policy, as implemented by the defendant, was anything but a valid business policy of Conrail, and therefore not violative of Section 2.

Having analyzed Conrail's rail-rate making policy, the court must next consider whether it is appropriate, on a motion for summary judgment, to conclude as a matter of law here that Conrail's make or buy policy is a legitimate business policy and therefore not violative of Section 2.

(c) The appropriateness of summary judgment.

In *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983), the plaintiff appealed a district court's granting of summary judgment in favor of the defendant in a suit based on both the Sherman Antitrust Act and the Clayton Act, § 3, 15 U.S.C. § 14. In upholding the district court's granting of summary judgment, the court stated:

> a decision to extend or withhold credit which is based upon valid business considerations does not

> violate § 2(a) [of the Clayton Act], and since the only record evidence establishes that [the defendant's] refusal to extend credit to [the plaintiff] . . . was based upon valid considerations, it was not error for the district court to grant summary judgment on this issue.

Id. at 1326. Similarly, in *Bell v. Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988), while finding a triable issue of fact in the Section 2 case that was before it, the fifth circuit noted:

> Defendants can offer business justifications for the refusal to deal. If the justifications are supported by legitimate business concerns . . . then the district court may decide as a matter of law that the defendant's refusal " 'was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' " *Eastman Kodak Co. v. Southern Photo Materials Co.* 273 U.S. 359, 375, 47 S.Ct. 400, 404 (1927).

Thus, it is appropriate for this court, on a motion for summary judgment, to find as a matter of law that a defendant's business practices are legitimate and not violative of the Sherman Act. Clearly, profit maximization is a legitimate business goal. The defendant's make or buy policy's sole goal is profit maximization. Therefore, this court finds that the defendant has not engaged in exclusionary conduct violative of Section 2 of the Sherman Antitrust Act.

(d) The essential facilities doctrine.

In addition to a traditional Section 2 analysis, the plaintiff argues that the defendant is not entitled to summary judgment on its monopolization claim because of the "essential facilities" doctrine. This doctrine is based on the theory that a monopolist in control of a scarce or essential facility must give competitors reason-

able access to the facility.[9] Since, as discussed below, the plaintiff has failed to prove one of the elements of this doctrine, it is precluded from invoking the same.

There are four elements necessary to establish liability under the essential facilities doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983).

Assuming, *arguendo*, that the relevant essential facility in this case is defendant's tracks, the defendant must prove that it could not duplicate this facility, and that Conrail refused D & H permission to use it.

Here, there can be no dispute that a physical duplication of defendant's lines would be an impractical and unreasonable project to undertake. Thus, this facility could only have been "duplicated" by Conrail allowing D & H the use of Conrail's tracks. An absolute refusal to allow a competitor the use of its facilities is not required in order to satisfy the third element of the essential facilities doctrine. Rather, if a company's offer to allow its competitor to use its facilities is unreasonable, then such an offer can be viewed as a refusal to deal at all. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.* 665 F.Supp 1493, 1534 (S.D.Fla. 1987), *aff'd.* 880 F.2d 297 (11th Cir. 1989).

Here, unlike in *Consolidated Gas*, this court has determined that defendant's make or buy policy is a reason-

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[9] *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1979), *citing United States v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912).

able, profit maximizing practice. The defendant was, at all times, willing to allow D & H the use of Conrail's tracks, via joint rates with D & H, as long as the overall contribution Conrail received for the job would have been no less than the amount it would receive for non-participation.

In *Laurel Sand & Gravel, Inc. v. CSX Transp. Inc.*, 704 F.Supp. 1309 (D.Md. 1989), the plaintiff brought an action claiming, *inter alia*, that defendant's joint rate proposal was unreasonable and therefore violative of the Sherman Act. In *Laurel*, as here, the court found the defendant's proposal to be reasonable. *Id.* at 1324. As a result, the *Laurel* court ruled that the plaintiff had failed to prove the third element of the essential facilities doctrine, and accordingly granted defendant's motion for summary judgment. *Id.* at 1324-25.

In the instant case, the plaintiff has failed to prove that Conrail denied D & H the use of Conrail's tracks. Therefore, the plaintiff cannot prevail in its antitrust claim utilizing the essential facilities doctrine.

2. The attempt to monopolize claim.

The second count in plaintiff's complaint alleges that the defendant has attempted to monopolize the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states. The elements for an attempt to monopolize claim were recently set forth in *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987), *cert. denied*, 482 U.S. 914 (1987). The Second Circuit stated that:

> [l]iability for attempted monopolization rests on proof of three elements: (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt will succeed.

Id. at 790 (citations omitted).

In *Neumann v. Reinforced Earth Co.*, 786 F.2d 424 (D.C.Cir. 1986), the court discussed at some length the general scope and philosophy behind a violation of Section 2 of the Sherman Act concerning an attempt by a company to monopolize a market. The court held:

> When the law speaks of attempts to monopolize, it generally refers to predation. Predation involves the deliberate seeking of monopoly power by means other than superior efficiency, by means that would not be employed in the normal course of competition. Thus, predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Id. at 427.

In addition to defendant's make or buy policy, which this court has already found to be a legitimate practice on the part of Conrail, the plaintiff refers to three specific actions taken by Conrail which D & H alleges proves Conrail's specific intent to monopolize the relevant market.

One of these acts was the installation of a fueling facility at Rockeville, Pennsylvania. The plaintiff alleges that Conrail persistently delayed D & H's trains while it refueled its own trains, and that if Conrail was refueling one of its trains, it would send the waiting D & H train on a different, longer route, causing additional delays and expense to D & H. Clearly, the installation of a fueling facility is not exclusionary conduct *per se*. In re-

sponse to defendant's motion, the plaintiff has failed to proffer any evidence proving that this facility was installed with the specific intent of monopolizing the market concerning the transportation of newsprint from Eastern Canada to the mid-Atlantic states. The second anti-competitive act alleged by plaintiff was Conrail's ruling permitting its dispatchers to prevent engineers, including those from D & H, from continuing travel along Conrail's tracks, upon a determination by Conrail that the engineer in question had worked too many hours. This policy was adopted by Conrail to improve safety over its railways. While there is no dispute that Conrail did, in fact, adopt such a policy, as with Conrail's conduct concerning the installation of the fueling facility, the plaintiff has not proffered any evidence which links this practice on the part of Conrail to the defendant's attempt to monopolize the relevant market. Additionally, there is no evidence before this court that any newsprint traffic from Eastern Canada moved over either of these areas, let alone that such traffic was delayed or diverted by the fueling facility or Conrail's application of the "hours of service" rule.

Finally, the plaintiff claims that Conrail arbitrarily refused to permit D & H to adjust its trains at facilities in Allentown, Pennsylvania. Once again, however, the plaintiff has proffered no proof which links this refusal to the plaintiff's claim that Conrail has attempted to monopolize the market concerning the transportation of newsprint from Eastern Canada to the mid-Atlantic states. In fact, the plaintiff, itself, in its memorandum opposing defendant's motion for summary judgment, claims that this conduct resulted in the loss to D & H of its ferro-manganese ore traffic, but is silent concerning a loss of any newsprint traffic. Thus, this evidence, too, is insufficient to prove anti-competitive conduct on the part of the defendant sufficient to withstand defendant's motion for summary judgment concerning plaintiff's attempt to monopolize claim.

Conclusion

The plaintiff has failed to prove that the defendant's make or buy rail-rate policy was anything other than a legitimate, profit-maximizing program on the part of the defendant. Therefore, defendant's conduct did not violate the Sherman Antitrust Act, under either traditional Section 2 analysis or under the essential facilities doctrine.

Additionally, the plaintiff has failed to prove that the defendant engaged in any exclusionary acts with the specific intent of monopolizing the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states. Thus, the plaintiff has not proven its attempt to monopolize claim. Accordingly, this court grants defendant's motion for summary judgment on both counts of plaintiff's complaint.

IT IS SO ORDERED.

Dated: November 15, 1989
Syracuse, New York

/s/ Neal P. McCurn
NEAL P. MCCURN
Chief
U.S. District Judge

UNITED STATES DISTRICT COURT
N.D. NEW YORK

No. 86-CV-810

DELAWARE AND HUDSON RAILWAY COMPANY,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

March 2, 1987

Dewey Ballantine Bushby Palmer & Wood, New York City, and Sanford M. Litvak, of counsel, George H. Kleinberger, Delaware and Hudson Ry. Co., Watervliet, N.Y., Kinga M. LaChapelle, of counsel, for plaintiff.

McNamee Lochner Titus & Williams, Albany, N.Y., and Scott A. Barbour, of counsel, Pepper Hamilton & Scheetz, Philadelphia, Pa., Laurence Z. Sheikman, Stephen J. Cipolla, Sean P. Wajert, of counsel, for defendant.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

This treble-damage antitrust action is brought pursuant to 15 U.S.C. § 15. The plaintiff, Delaware and Hudson Railway Company ("D & H"), asserts that it has been injured by actions of the defendant, Consolidated Railway Company ("Conrail"), in contravention

of Section two of the Sherman Act, 15 U.S.C. § 2, which forbids a person or company to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." *Id.* Pending before the court is a motion by Conrail to dismiss the complaint pursuant to F.R.C.P. 12(b)(6). Accordingly, all well-pleaded allegations in the complaint are accepted as true and provide the basis for this court's analysis and decision. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

I. BACKGROUND

D & H is a Delaware corporation which provides rail transportation services throughout the Mid-Atlantic region. Conrail is a Pennsylvania corporation organized pursuant to the Regional Rail Reorganization Act of 1973, Pub.L. No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. § 741). Conrail was organized by Congress because of the massive collapse of regional railroads in the 1970's. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). It provides rail transportation services to the Northeast and the Midwest.

D & H and Conrail are competitors. Nevertheless, because of the nature of the railroad business they must jointly participate in the use of rail facilities. No railroad is capable of providing service to every shipper location in the United States. In order to provide national service, railroads are required to participate in "through routes," which are business arrangements made between two or more railroads where they agree to move freight in continuous carriage between the origin on one railroad and the final destination on another. Railroads also operate "single line routes". On a single line route, the entire railway from origin to destination belongs exclusively to one railroad. Larger railroads, such as Conrail, own many single line routes. The smaller railroads, such as D & H, often must interconnect with the larger railroads

by the use of through routes to provide service to major metropolitan areas.

Through routes and single line routes may serve the same corridor.[1] Conrail owns a single line route between Chicago and Albany, while Conrail and D & H participate in a through route between those two cities. The through route consists of carriage on Conrail lines between Chicago and Buffalo, and carriage on D & H lines between Buffalo and Albany. There may also be more than one through route servicing the same corridor. Where two or more routes serve the same corridor, they are in direct competition for shippers' business in the corridor.

An important factor in competition is the price, or rate, charged to the shipper. There are three basic rates of concern in this action. A "single line rate" is the rate charged by the operator of a single line route. A "combination rate" is the aggregate of two or more rates on a through route. For example, on the Chicago-Albany through route described above, the combination rate could be the sum of the Conrail Chicago-Buffalo rate and the D & H Buffalo-Albany rate. Finally, a "joint rate" is a single rate charged to a shipper for transport on a through route. The revenues derived from joint rates are divided between the carriers participating in the through route pursuant to contract. On the Albany-Chicago route described above, for example, a single rate could be charged to shippers. The revenues derived from charging that rate would be divided between Conrail and D & H pursuant to a predetermined formula.

Regulation is also a factor in competition. Prior to the mid and late 1970's, price competition between rail-

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[1] Corridor is used here as a shorthand notation for origin-destination combination. For example, a corridor exists between Albany and Chicago.

roads was considered to be unhealthy for the railroad industry and the consumer. Therefore, the establishment and regulation of rates was the province of the Interstate Commerce Commission ("ICC"). The ICC frequently encouraged or compelled the railroads to establish a system of "equalized joint rates". Under that system, the same rate applied equally over all single and joint routes serving a particular corridor.[2] In addition, a joint rate could not be changed or cancelled except with the concurrence of all carriers who participated in the relevant joint route, or after a lengthy proceeding before the ICC. The ICC also controlled other aspects of the railroad industry, including the imposition of reciprocal switching charges.[3]

The passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Publ.L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Publ.L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), however, changed the face of railroad regulation by the ICC. In the preamble to the Staggers Act, Congress declared it to be the national policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a(1). Among other changes intended to substitute marketplace forces for regulation, the Staggers Act stripped the ICC of all jurisdiction to review rates and charges except in limited circumstances where they fall above or below certain jurisdictional thresholds. *See* 49 U.S.C. §§ 10701a and 10709. In addition, a carrier is now permitted to cancel a joint rate subject to certain exceptions. *See* 49 U.S.C. § 10705a(c).

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[2] Combination rates were not affected.

[3] Reciprocal switching is a service whereby one railroad will transport freight cars of another railroad for access to a point served only by the former railroad. The company providing the service does so for a per car fee.

II. COMPLAINT

Against the above background, D & H asserts that Conrail has violated Section two of the Sherman Act to the detriment of D & H. D & H claims that prior to Conrail's unlawful conduct, D & H provided an effective competitive alternative to Conrail service throughout many corridors. Conrail's conduct has allegedly interfered with that competition.

A. *Count I*

D & H first claims that Conrail has monopolized the railroad industry in the Eastern Territory.[4] Paragraph eleven of the complaint asserts, in part:

> In the Northeast, Conrail is the only railroad serving more than 2,600 stations with some 61,000 customers. Out of all the railroad stations in Connecticut and New Jersey, for example, Conrail exclusively serves over 75% and 80% respectively. In the Philadelphia and Northern New Jersey areas, Conrail exclusively serves over 98% of the railroad served stations. Any shipper wishing to ship from these captive stations must use Conrail until an open interchange[5] is reached. Conversely, any shipper wishing to ship to these captive stations must use Conrail from the last open interchange to the stations served exclusively by Conrail. Any other railroad wishing to transport freight originating at or destined to Conrail's captive stations must deal with Conrail.

Conrail has allegedly exercised monopoly power, unlawfully monopolizing the Eastern Territory, through a

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[4] The Eastern Territory is a ratemaking territory comprised generally of the New England, Middle Atlantic and Midwestern states to the east of the Mississippi River and the north of (and including) Norfolk and Western Railway's Norfolk to Cincinnati line.

[5] An open interchange is a junction between two or more railroads where the railroads maintain through routes.

series of acts decribed in paragraph fifteen of the complaint. D & H maintains that these acts were designed to single out routes in a corridor which were most profitable to Conrail, and force out the other routes in competition with Conrail's profitable routes. It is urged that Conrail selectively cancelled participation in joint rates on through routes effective July 25, 1981. When the joint rates were cancelled, the through routes became priced at a combination rate. Because combination rates are apparently higher than joint rates, these through routes, in which smaller railroads such as D & H participated, became disadvantaged competitively. Similar cancellations are claimed to have occurred in October of 1982 and July of 1984. D & H contends that Conrail has also refused to negotiate on the establishment of new joint rates which would be responsive to price competition and market conditions. Further, D & H asserts that Conrail has increased reciprocal switching charges to D & H to make the use of D & H lines prohibitively expensive to shippers, and that Conrail has engaged in other conduct designed to foreclose competition and monopolize the relevant market.

B. *Count II*

Count II of the complaint avers that Conrail has "attempted" to monopolize the relevant market in contravention of Section two of the Sherman Act. Paragraph twenty-three of the complaint lists several acts by Conrail which, in combination with those acts listed in Count I and discussed above, allegedly demonstrate Conrail's attempt to monopolize. These acts generally involve Conrail's use of its facilities in such a manner as to delay and impede the operation of D & H trains. For example, paragraph 23(a) provides that Conrail refuels its own trains on a main line used jointly by Conrail and D & H. The refueling purportedly delays priority trains of D & H.

C. *Requested Relief*

The complaint demands as relief treble damages pursuant to 15 U.S.C. § 15. The complaint does not provide the basis for damage calculation. Counsel for D & H did explain at oral argument, however, that D & H is seeking damages based on profits allegedly lost as a consequence of Conrail's actions. Trans. at 52-53. D & H also demands injunctive relief prohibiting Conrail from partaking in further anticompetitive conduct and restoring joint rates, among other things, cancelled by Conrail. Finally, plaintiff D & H seeks costs and attorneys' fees associated with the prosecution of this action.

III. THE MOTION TO DISMISS

Although the motion papers are styled to request dismissal pursuant to F.R.C.P. 12(b)(6), counsel for Conrail has stated at oral argument that defendant does not seek a complete dismissal of this action. Trans. at 4-5. Rather, it claims that D & H cannot obtain relief in either Counts I or II with respect to actions taken by Conrail prior to July 15, 1982, because such relief is barred by the four-year statute of limitations contained in 15 U.S.C. § 15b. Conrail claims further that the acts described in Count II do not constitute attempts to monopolize, but rather violations of state contract or landlord/tenant law. Additionally, Conrail contends that granting the relief requested would unlawfully interfere with the power of the ICC. Finally, Conrail argues that D & H's claims unaffected by the above should be stayed in order to receive the view of the ICC pursuant to the doctrine of "preliminary exclusive" or "primary" jurisdiction.

IV. DISCUSSION

Despite Conrail's use of the primary jurisdiction doctrine to dispose of D & H claims not eliminated by other arguments, the court considers the primary jurisdiction

issue to be the most comprehensive and important issue presented here. Accordingly, that issue will be considered first.

A. *Primary Jurisdiction*

Conrail must of course recognize that by asserting the doctrine of primary jurisdiction, it does not follow that this court is without jurisdiction to hear the antitrust claims of D & H. In a long line of cases, the Supreme Court has repeatedly rejected the notion that regulated industries are exempt from the antitrust laws. *See e.g. Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456, 65 S.Ct. 716, 725, 89 L.Ed. 1051 (1945). This is particularly true since the passage of the Staggers Act, which seeks to free rail carriers from regulatory restraint. *See e.g. Cleveland-Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568, 588 (6th Cir. 1981). The deregulation contained in the Staggers Act exposed rail carriers to all kinds of market forces, including the antitrust laws. *Transkentucky Trans. R.R. v. Louisville & N.R.R.*, 581 F.Supp. 759, 764-65 (E.D.Ky.1983).

The doctrine of primary jurisdiction is applicable, however, where the courts and the ICC have concurrent jurisdiction over a dispute involving issues "beyond the conventional experience of judges." *Engelhardt v. Consolidated Rail Corp.*, 756 F.2d 1368, 1369 (2d Cir.1985). "The doctrine comes into play when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme have been placed within the special competence of an administrative body.'" *Hansen v. Norfolk & W. Ry.*, 689 F.2d 707, 710 (7th Cir. 1982) (quoting *United States v. Western Pacific R.R.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956)). In such a case, the court will stay its hand until the agency has applied its expertise to the salient questions. *Engelhardt*, 756 F.2d at 1369.

1. *Application of the Doctrine by other Courts*

Because there is no fixed formula for the application of the doctrine, a case-by-case factual analysis is required. *Engelhardt v. Consolidated Rail Corp.*, 594 F.Supp. 1157, 1164 (N.D.N.Y.1984, *aff'd*, 756 F.2d 1368 (2d Cir.1985). A survey of the doctrine's application by other courts is instructive. In some cases the courts deferred judicial action in order to obtain a necessary initial determination from an agency so as to avoid the possibility of inconsistent decisions. In *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed.2d 408 (1932), and *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed 576 (1952), the plaintiffs challenged price setting agreements between shipping companies as violative of the antitrust laws. If such agreements had been approved by the Federal Maritime Commission, however, they would have been exempt from the operation of the antitrust laws. Rather than risk the possibility of a later inconsistent determination from the Commission, the *Cunard* and *Far East* Courts deferred judicial consideration until the Commission considered the agreements in question. A similar deferral occurred in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973). In *Ricci*, the plaintiff asserted that the defendants had acted pursuant to an unlawful conspiracy, and thereby injured his brokerage business. The Court determined, however, that if the defendants' conduct was approved by the Commodity Exchange Commission there may have been immunity from the application of antitrust laws. *Id.* at 298-306, 93 S.Ct. at 579-582. The Court opined:

> We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, a matter that seems to depend in the first instance on whether

> the transfer of Ricci's membership was in violation of the Act for failure to follow Exchange rules. That issue in turn appears to pose issues of fact and questions about the scope, meaning, and significance of Exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case. (citations omitted)

Id. at 305, 93 S.Ct. at 582. Moreover, the Second Circuit subscribes to the use of the primary jurisdiction doctrine to obtain necessary preliminary decisions from agencies. In *Engelhardt*, three employees of Conrail, formerly employed by the New Haven Railroad (which became part of Penn Central and then Conrail), brought suit pursuant to 49 U.S.C. § 11347 alleging violation of orders promulgated by the ICC in connection with the creation of the Penn Central system. The court thought it proper to have the ICC interpret its own orders:

> We simply cannot say with any certainty whether the I.C.C. orders relating to the creation of the Penn Central System were violated by the seniority scheme underlying this dispute. That question, from which flows the resolution of this claim, properly lies within the discretion of the I.C.C.

Id. at 1369.

Courts have also deferred to administrative proceedings where such proceeding would narrow and define complex legal and factual controversies. In *Hansen*, the plaintiff, a trucking company, charged defendants, various trucking and rail transportation companies, with violating the tariff requirements of Section 10761(a) of the Interstate Commerce Act, Sections one and two of the Sherman Act, and Section two of the Clayton Act. Central to both the interstate commerce and antitrust

claims was plaintiff's allegation that defendants conspired to control the provision of piggyback service [6] and to thereby circumvent applicable ICC tariffs. *Hansen*, 689 F.2d at 709. The court stayed both the interstate commerce and the antitrust claims pending proceedings by the ICC. In so doing, the court noted:

> Piggyback service . . . poses difficult transportation policy problems involving the appropriate allocation of services between rail and motor carriers. Because the plaintiff's complaint raises such difficult problems, judicial consideration of this cause must await proceedings by the specialized agency created by Congress to deal with transportation policy—the I.C.C.

Id. at 711. Even though the ICC had no jurisdiction over the antitrust claims, the court also stayed such claims pending ICC action on the claims within its jurisdiction. *Id.* at 713. The court determined that the ICC consideration may "narrow or refine the factual issues relating to the plaintiff's antitrust claims." *Id.* Moreover, the court determined that the complaint raised issues regarding the proper relationship between the Interstate Commerce Act and the antitrust laws, and opined that "an I.C.C. determination of whether the Commerce Act has been violated will be of immense aid to the court hearing of the plaintiff's antitrust claims." *Id.*

In *GTE Sprint Communications Corp. v. Downey*, 628 F.Supp. 193 (D.Conn.1986), the plaintiffs sought to enjoin enforcement of a Connecticut state law regulating intrastate communications. The principal thrust of the plaintiffs' argument was that portions of the law intruded into an area of telecommunications preempted by

[6] Piggyback service involves railroad carriage of containers or vehicles, such as trucks, suitable for immediate transfer to another mode of transportation.

the Communications Act of 1934, 47 U.S.C. § 1 *et seq.*, and exclusively regulated by the Federal Communications Commission ("FCC"). The court referred the question of preemption to the FCC under the primary jurisdiction doctrine. In so doing, the court noted that the resolution of the preemption issue required extensive findings of complicated and controverted technical facts beyond the conventional experience of judges. *GTE Sprint*, 628 F.Supp. at 195-96.

2. *Application of the Doctrine to the Present Facts*

Conrail asserts that the ICC can and should consider D & H's claims at the outset. Conrail recognizes that these antitrust claims do not fall within the jurisdiction of the ICC. Although the ICC may consider antitrust principles in its determinations, the agency lacks authority to enforce the antitrust laws or even determine if they have been violated. *Transkentucky*, 581 F. Supp. at 767, (citing *McKlean Trucking Co. v. United States*, 321 U.S. 67, 79, 64 S.Ct. 370, 376, 88 L.Ed. 544 (1944)). Conrail asserts, however, that the individual instances of Conrail's allegedly unlawful conduct, such as the 1982 joint rate cancellations, can be considered by the ICC, and that such consideration should precede further judicial action.

There can be no dispute that the ICC can consider whether many, if not all, of the alleged acts of Conrail violate the Interstate Commerce Act and the national rail policy enunciated therein. 49 U.S.C. §§ 10705 and 11103 provide the ICC with the power to prescribe "in the public interest" joint rates and reciprocal switching arrangements. Pursuant to that power, the ICC has promulgated rules, effective December 6, 1985, to govern the handling of the following competitive access issues: cancellation of through routes and joint rates; and prescription of through routes, through rates, and reciprocal switching. *See* 49 C.F.R. § 1144. Accordingly, the ICC can suspend, investigate and/or negate a through route

or joint rate cancellation as well as a modification to a switching arrangement where it finds that such modifications or cancellations are contrary to the competition policies of 49 U.S.C. § 10101a.[7] *See* 49 C.F.R. §§ 1144.3, 1144.4 & 1144.5.

The complaint asserts that Conrail's acts of joint rate cancellations and increased reciprocal switching charges *in the aggregate* demonstrate Conrail's monopolization or attempted monopolization of the relevant market, however. The narrow issue facing this court, then, is whether the court should postpone considering Conrail's acts in the aggregate until the ICC has had a chance to consider them individually.

Unlike the facts presented in *Cunard, Far East, Ricci,* and *Engelhardt,* the court need not obtain an initial de-

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[7] 49 U.S.C. § 10101a provides, in pertinent part:

In regulating the railroad industry, it it the policy of the United States Government—

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> * * * *
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> * * * *
>
> (13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

termination of an administrative agency to guide the application of the substantive law. It is conceivable that every individual act of Conrail's be approved by the ICC and yet in the aggregate violate the antitrust laws as an unlawful pattern of conduct designed to destroy competitors such as D & H. "The mere fact of . . . authorization of rates or contracts or other conduct by a regulatory agency does not obviate the possibility that such rates, contracts or conduct, although authorized for one purpose, may be used for another unlawful purpose." *Transkentucky*, 581 F.Supp. at 767-68.

The only justification for deferral, therefore, is to permit the ICC to narrow and define complex legal and factual controversies. There are indeed complex legal and factual controversies presented here. Conrail's alleged conduct, for example, must be analyzed in light of changes in national rail regulatory policy. Furthermore, Conrail's actions involve business relationships, terminology, and a geographic expanse with which this court is presently unfamiliar. In the final analysis, however, this court has the responsibility to find the facts and apply them to the law of antitrust. While efforts by the ICC may be helpful to the court in carrying out that responsibility, that aid is overshadowed by other considerations.

First, the aid provided by ICC consideration may be minimal. The ICC could, of course, function as a fact finder and summarize the facts that may be relevant to this antitrust action. The parties agree here, however, that as to liability this action is likely to be appropriately disposed of by summary judgment. Trans. at 64-65. The court is confident that it can marshal the facts as adequately from materials submitted on such motions as from ICC documents. Moreover, any legal consideration provided by the ICC may not be suitable to the antitrust analysis. Conrail's Reply Brief includes a copy of Interstate Commerce Commission Decision Number 38676 to

demonstrate the type of consideration the ICC could provide D & H's claims. *See* Conrail Reply Memorandum at Appendix A. A brief examination of the decision reveals that it provides little that is pertinent to a traditional antitrust analysis.[8] Second, deferral of this case, which would essentially require the plaintiff to proceed before the ICC, would deprive the plaintiff of his choice of forum as well as cause substantial delay which could significantly harm the plaintiff's business. Consequently, under the discretion inherent in the doctrine of primary jurisdiction, *see GTE Sprint*, 628 F.Supp. at 195, the court denies Conrail's motion to stay or dismiss the plaintiff's complaint pursuant to such doctrine. Having denied this motion, the court must consider the other arguments advanced by Conrail.

B. *Attempt to Monopolize*

Conrail argues that much of the conduct alleged in Count II concerns alleged disputes between Conrail as "landlord" and D & H as "tenant". Conrail asserts that

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[8] The complaint alleges that Conrail has monopolized or attempted to monopolize the relevant rail market. The law applicable to such allegations is clear. In order to prove unlawful monopolization, the plaintiff must demonstrate the defendant's monopoly power and its willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). To prove an attempt to monopolize, the plaintiff must show that the defendant employed methods which, though falling short of monopolization, create a dangerous probability of it with the specific intent to destroy competition or build a monopoly. *Buffalo Courier-Exp. v. Buffalo Evening News*, 601 F.2d 48, 54 (2d Cir.1979). The ICC analysis in Decision Number 38676 concentrates primarily on evidence related to transit time, mileage, and fuel consumption associated with joint rate cancellations. Such information would appear, at least at this juncture, to have little impact on the application of the law summarized above.

such conduct cannot be anticompetitive because it is not derived from Conrail's power in the market, or its size. *See* Conrail's Brief at 38-40. This argument has no merit on this motion to dismiss. It is of no import to the antitrust analysis whether the parties stand in relation as landlord and tenant or as other contractors so long as it is appropriately alleged that the defendant's actions were undertaken with the purpose to create or maintain a monopoly. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *see also supra* note 8. Here, Count II adequately alleges that these actions were undertaken to drive out D & H as a competitor. Moreover, whether or not Conrail's conduct was derived from its market power is a question of fact that should not be addressed on a motion to dismiss.

C. *Statute of Limitations*

Under Section 4B of the Clayton Act, 15 U.S.C. § 15b, any action to recover treble damages in private antitrust must be commenced within four years after the cause of action has accrued. Conrail asserts that certain portions of D & H's complaint[9] should be dismissed because they allege acts occurring more than four years prior to the commencement of this action. For example, Conrail asserts that the allegations of subparagraphs 15(a) and 15(b) of the complaint, which concern joint rate cancellations effective July 25, 1981, nearly five years before the action was commenced, should be dismissed as time-barred. The question presented is when did the causes of action associated with these pre-limitations acts accrue. Conrail argues that they accrued on the date of the relevant acts. D & H claims, on the other hand, that accrual cannot be fixed at such dates because monopolization constitutes a continuing violation of the antitrust laws.

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[9] Specifically, paragraphs 15(a), (b), (e), and (g).

D & H's implication that monopolization is always a continuing violation cannot be accepted. First, it is inconsistent with the basic understanding of a monopolization claim. Monopolization involves (1) monopoly power and (2) acts that demonstrate unlawful maintenance or acquisition of that power. *See supra* note 8. Consequently, the *acts* of unlawful maintenance or acquisition have taken on a particular significance in antitrust law. *See,* ABA Antitrust Section, Antitrust Law Developments, 121-39 (2d ed. 1984). To accept the proposition that once such an act has been committed, an action to recover for resulting damages is never barred detracts from that significance.[10] More importantly, D & H's position is not supported by law:

> Continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages *must be based on some injurious act actually occurring during the limitations period,* not merely the abateable but unabated inertial consequences of some pre-limitations action. (emphasis added)

Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed.2d 643 (1976). In other words, where all the damages complained of necessarily result from a pre-limitations act by the defendant, the cause of action does not "continually accrue" into the limitations period. *See Imperial Point Colonnades Condominium v. Mangurian,* 549 F.2d 1029 (5th Cir.), *cert. denied,* 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132

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[10] D & H asserts that the four-year-period of 15 U.S.C. 15b functions merely as a limitation of damages. That is, a successful complainant can only recover for damages occurring during the four years prior to the filing of the complaint, regardless of when the acts that caused those damages occurred. Trans. at 33.

(1977); *see also Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F.Supp. 218 (S.D.N.Y.1979).

Consequently, it appears doubtful at this juncture that D & H can recover damages resulting from acts taken by Conrail prior to the limitations period. D & H's position "resembles that of a disappointed patron of the theater, when turned away from the theater at eight o'clock because the performance is sold out, his exclusion occurs at eight, not during the performance or when it concludes at eleven o'clock." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), *cert. denied*, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979).

Nevertheless, dismissal is inappropriate. Conrail asks this court to dismiss portions of D & H's claim. Such a piecemeal approach to an antitrust claim is improper. *See Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Moreover, facts may be presented which substantiate a determination of a continuing violation. For example, D & H's damages may not *necessarily* result from pre-limitations acts. Timely acts of Conrail might have contributed to the damages associated with pre-limitations acts. *See Imperial Point*, 549 F.Supp. at 1035-44. As a factual question is presented, Conrail's motion to dismiss based on the statute of limitations is denied. *See Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 731-32 (8th Cir.1964).

D. *Relief*

Conrail finally argues that much of the relief requested by D & H is unavailable in this court. Conrail claims that the doctrine announced in *Keogh v. Chicago & N.W. R.R.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922) precludes the award of damages to D & H. In *Keogh*, a shipper's complaint alleged that rates filed with the ICC by the defendants had been fixed pursuant to an agreement prohibited by the Sherman Act. The

shipper claimed treble damages measured by the difference between the rates set pursuant to the unlawful agreement and those that had previously been in effect. The Court determined that the shipper could recover no damages:

> The Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates, and that the legal right of the shippers against the carrier had to be measured by the published tariff. It therefore concluded that the Shipper could not have been injured in his business or property within the meaning of the [Sherman Act.]

Square D. Co. v. Niagra Frontier Tariff Bureau, —— U.S. ——, 106 S.Ct. 1922, 1926, 90 L.Ed.2d 413 (1986) (*construing Keogh*).

The present complaint does not implicate *Keogh,* however. Plaintiff's complaint does not put into issue the lawfulness of the defendant's rates under the Interstate Commerce Act. D & H does not seek damages as a shipper who has been charged unreasonably high rates. D & H seeks to establish that Conrail engaged in a pattern of conduct specifically designed to eliminate D & H as a competitor. The plaintiff's damages will be measured not by the difference between existing rates and some hypothetical rates, but by business losses it has allegedly sustained. Such a measure of damages is perfectly acceptable in an antitrust action. *See e.g. Eastman Kodak Co. v. Southern Photo Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); *First National Bank v. British Petroleum Co.,* 324 F.Supp. 1348 (S.D.N.Y. 1971); *Transkentucky,* 581 F.Supp. at 767.

Conrail next argues that injunctive relief is precluded by Section 16 of the Clayton Act, 15 U.S.C. § 26, which permits private injunctive relief in antitrust actions.

> [P]rovided, [T]hat nothing herein contained shall be construed to entitle any person, firm, corporation,

> or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of [49 U.S.C. § 1 *et seq.*] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

15 U.S.C. § 26. D & H's request for injunctive relief is broad, and much of it may indeed be barred by 15 U.S.C. § 26. The court is not prepared at this stage of the proceedings, however, to rule out all forms of injunctive relief. *See Transkentucky*, 581 F.Supp. at 768. Consequently, Conrail's motion to strike D & H's claims for injunctive relief is denied without prejudice.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of June, one thousand nine hundred and ninety.

Docket Number 89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

[Filed Jun. 6, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellee CONSOLIDATED RAIL CORPORATION

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 40224

IOWA POWER AND LIGHT COMPANY

v.

BURLINGTON NORTHERN RAILROAD COMPANY

EXCERPTS FROM THE
VERIFIED STATEMENT OF WILLIAM J. BAUMOL

(May 21, 1990)

* * * *

The essence of the matter at issue here is the desire of Iowa Power and Light Company (IPL) to obtain reciprocal switching service from BN in order to permit IPL to utilize the facilities of Chicago and North Western Transportation Company (CNW) and Union Pacific Railroad Company (UP) to transport coal from the Powder River Basin to IPL's generating facilities at Council Bluffs, Iowa. The transportation in question can also be provided by BN as through-route service. The substantive issue is the proper price at which the switching service should be offered by BN.

Pricing is, of course, something that affects the interests of the public profoundly, and not just those of IPL, BN and CNW/UP. The desires of those parties on the level of the switching rate in this particular situation seem fairly obvious, but the nature of the price that most effectively promotes economic efficiency, thereby serving the public interest, is not quite so obvious. Nevertheless,

the pertinent principles are well known and, as will be shown here, those principles lead to an unambiguous resolution of the pricing matter under dispute.

Here I will undertake to describe the economic principles that govern efficient pricing of a service such as BN's reciprocal switching service, and to explain the logic of those principles. I will show that the efficient pricing rules are profoundly affected by two attributes of the reciprocal switching service at issue in this proceeding: (a) the fact that it is not an end product, in itself but is, rather, just a component of the final product which is the transportation of coal from the mine to IPL's generating station at Council Bluffs, Iowa; and (b) the fact that BN, the supplier of the switching service component of the final product, is also a supplier of the remaining components of the final product, but BN is not the only provider of those other components.

The relevant pricing principle (to which I will refer as "efficient component pricing") is that the supplier of such a product component is entitled to receive for it a price that makes that supplier indifferent as to whether the other components of the final product are provided by itself (that is, the traffic is carried entirely over its own lines, from origin to destination), or whether, instead, those remaining components are supplied by others (the traffic is carried over a joint route operated in whole or in part by competitors). This rule follows the well-known economic principle that efficiency requires the price of a product to cover its full incremental cost, *including its opportunity cost.* That is so because if the supplier of the component in question receives for it a price that covers its full opportunity cost, that means by definition that it will be just as well off whether the rest of the product is supplied by itself or by others—it will be indifferent between the two arrangements.

It will be shown that this is not only the pricing rule required by economic efficiency—it is also the rule im-

posed by economic forces in competitive markets. That is, in competitive markets such product components are in fact priced in the manner described. This observation is of critical importance given the fact that in such highly competitive circumstances it is generally agreed that regulatory intervention on pricing matters is not called for by general welfare considerations, and that in such a case any price changes imposed by regulation will be detrimental to the public interest.

* * * *

There are many cases in reality in which (1) the supplier of a critical component of a final product also supplies the final product in which that component is used, but (2) where that firm is only one of a number of enterprises that supplies or is prepared to supply the other component(s) of that final product. A clear example is a pharmaceutical manufacturer, Firm A, which is the sole supplier of medical ingredient X on which it holds a patent. The final product may require other medical ingredients, capsule cases, packaging and marketing services, all of which Firm A can also provide, though it is by no means the only enterprise that is in a position to do so.

Efficiency clearly requires that provision of capsule cases, packaging, marketing services, etc., each be left in the hands of those firms that can do it most efficiently (cheaply), *i.e.*, those who can provide these components by means that reduce to a minimum the value of the labor, fuel, raw material and other inputs used in producing the components.

Looked at in this way, the choice is often interpreted as a "make-or-buy decision" on the part of Firm A, the supplier of patent-protected component X. Firm A should make the capsule cases, the packaging, etc., if and only if it is the more-efficient supplier of these items. Otherwise, the public interest dictates that Firm A should

buy those components from a rival supplier who can provide them more efficiently than Firm A can do so for itself.

Whether Firm A will, in fact, make the efficient choice voluntarily is, clearly, a matter of the relative price of the competing services of a component Y. If the price of Y when offered by a rival supplier is lower than the cost that Firm A will incur when making the item for itself, it will pay A to buy component Y, rather than making it. Efficiency in pricing, then, requires component Y to be priced below Firm A's pertinent costs if the rival firm is the most efficient supplier of Y, and it requires that price to be above Firm A's cost if Firm A is the more-efficient provider of Y.

* * * *

Without implying that BN does in fact have any market or monopoly power derived from its ownership of the switching facilities over the transportation of coal from the Powder River Basin to IPL's Council Bluffs generating facilities, it is nevertheless appropriate to examine what regulatory rules should govern if that were so. It is therefore necessary for me to proceed on the hypothetical assumption that BN does have such power and to examine whether its pricing behavior nevertheless is consistent with the behavior of a competitive supplier in otherwise similar circumstances. For, as I have just shown, if the hypothetical monopolist nevertheless prices as a competitor would have done, that pricing must be considered consistent with the public interest and cannot be deemed anticompetitive.

How, then, would a firm, similar to the hypothetical monopolist (except that it operates in competitive circumstances) price a component of which it is the sole supplier, when it also supplies other components of the final product and does so in competition with others? An illustration will make the answer clear. For the prod-

uct with a sole supplier really to be competitive there must be close substitutes available. Consider the hypothetical owner of a piece of land that is a good location for a retail establishment. There are other nearby pieces of land available, so that the landowner is in no position to charge a monopoly rent for his property. A retail chain approaches the landlord and proposes to construct an outlet upon that land, but the landlord has also been considering doing so on his own, and has calculated that he can expect to earn $100,000 in net profit from operation of such a shop. In this case, how much will the landlord charge the retail chain for use of the land if he is to be induced to rent it to that organization? The answer is obvious. The landlord will expect interest on the money he has invested in the land. He will also expect, and receive, compensation for any improvements the tenant requires. But, in addition, he will also expect and receive full compensation for the $100,000 in profits he foregoes by not using the land to construct a retail outlet of his own.

Of course, the prospective tenant may or may not choose to accept such an offer. But in a free competitive market he cannot expect to get the land more cheaply than that, because rather than accept any lower price, the landlord will find it rational to do the retailing himself.

Only a moment's consideration is needed to confirm that pricing of this sort is normal business practice, that it will occur under the most competitive of conditions, and that there is nothing inequitable about the price in question as the rental fee offered by the landlord to the tenant.

The issue now before us is precisely analogous, and in regulatory hearings dealing with similar matters it has actually been customary to use the landlord-tenant nomenclature to get at the substance of the issue. Here, BN is the landlord who owns the switching facilities, and IPL wants CNW/UP to become a tenant in use of those

facilities. The activity for which those facilities are to be used is, of course, not retailing, but the transportation of coal from the Powder River Basin to the IPL plant. There is nothing inherently different between the pricing issue raised by IPL in this proceeding and that in the retailer-landlord illustration. Without committing myself at this point, one way or the other, on the degree of competitiveness of the activity in question, it is clear that BN will be pricing switching in a competitive manner if it makes a genuine offer to CNW/UP (or to IPL which appears to be acting as CNW/UP's de facto agent here) to give it the use of its facilities at a price that includes all the incremental costs stemming from CNW/UP's tenancy, plus any opportunity cost it incurs as a result, consequent upon whatever amount of transportation business IPL decides to switch from BN to CNW and/or UP. The competitive model shows that, at any lower price, BN will receive less than full compensation for the rental of its facilities and that it is then justified in insistence upon retention of the transportation activity for itself, just as our hypothetical retailer landlord would insist, at a similarly inadequate price, on doing the work of retailing himself.

To say that such pricing is unacceptable is tantamount to rejecting competitive market performance as the proper guide for pricing. I doubt whether any of the parties to this case is prepared to take such a position.

* * * *

What is actually the substance of the issue in the pricing of components? Whose interests are really at stake? The experience derived from the history of competitive access cases before the Interstate Commerce Commission reveals the answer. In all these cases, including that currently before the Commission, the issue has been a matter of the division of the total revenues from the sale of the final product, between the landlord and the tenant when that product is supplied jointly by the two

parties. In the current case, if line-haul transportation from the Powder River Basin is provided by CNW/UP and switching is supplied by BN, the real issue is the division of the total revenue among the carriers, along what amounts to a joint route. In terms of my earlier illustration, if the market permits a charge of $30 per unit for the entire product, the question to be settled is the proportion of the $30 that goes to each of the suppliers. Where that is in dispute it is normal to find those suppliers to be the directly contending parties. Where that is so, their goals are clear—each side seeking legal intervention to force a redivision of the revenues that is in its own favor.

The efficient component-pricing rule provides a competitive-market standard (that is, an efficiency standard) for settlement of such disputes. It yields an unambiguous price for the switching services, one that is called for by the public interest.

No regulatory intervention is needed to impose that price. Where price is set by arms length negotiations between the parties, it serves the wholesaler's ("the landlord's") interests to offer its product component at a price consistent with the efficient component-pricing rule. Any price lower than that is clearly not in its interest, while any price that excludes a more-efficient supplier of the remaining components may force the wholesaler to produce the item itself, at its own higher costs (that is, it will force the wholesaler to "make" the remaining components itself when it would have been cheaper to "buy" them).

Not only will it pay the wholesaler to offer, voluntarily, to provide its component at a price approximating the efficient component-price level. Once that offer is made, it will also pay a more-efficient retailer to accept it because such a price enables that retailer to reap profits commensurate with its own efficiency margin over the wholesaler, in performance of the retailing task.

Thus, in the absence of regulatory intervention, the market will work here with its usual efficacy. The two parties, negotiating without constraint, will find themselves induced by pursuit of self interest to converge upon the component price that best serves the public interest.

It is noteworthy that regulatory intervention, or even its prospect, can change all that. In particular, it can lead the retailer to reject the wholesaler's *bona fide* offer for strategic purposes, hoping thereby to convince the regulator that the market was not working, and that the wholesaler was unwilling to make legitimate price offers. If it succeeds in this strategy, the regulatory agency may be induced to force the wholesaler to provide an interfirm cross subsidy for the benefit of the retailer. Thus, the mere threat of regulatory intervention can lead to a breakdown of the automatic market processes and prevent adoption of the efficient component price.

* * * *

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 445 (Sub-No. 1)

INTRAMODAL RAIL COMPETITION

EXCERPTS FROM THE VERIFIED STATEMENT OF WILLIAM J. BAUMOL AND ROBERT D. WILLIG

(May 28, 1985)

* * * *

I. *The Competitive Norm as the Appropriate Guide*

Before turning to the three proposals themselves it is necessary to review briefly the criteria on which we believe they should be evaluated. Happily, these standards —the attributes of free competitive markets—are not disputed matters, but are, on the contrary, widely accepted by regulators, lawmakers and our fellow economists. Nor is there any disagreement on the basic objective to be served—the promotion of the public interest through the encouragement of economic efficiency. As we will show, however, this generally accepted goal and the accompanying standards for appropriate regulation provide clear economic ground rules for regulation of intramodal rail competition.

Turning, then, to the standards appropriate for evaluation of the three proposals here at issue, these may be encapsulated in the following observations:

1. The standard by which any system to regulate rates should be judged is whether it promises to serve as an

effective proxy for the free competitive market—that is, whether it will promote performance in the regulated arena that is as similar as possible to that which would be induced by competition. It is widely recognized that competition weeds out inefficiency, encourages productivity and technological progress, and generally benefits society by providing a combination of goods and services whose qualities and attributes are adapted to the demands of consumers using up as small a quantity of resources as possible in the supply of these products. In markets where competition is effective, no regulation is necessary. Where regulation is required, it should replicate the results of competition as closely as possible. [footnote omitted]

2. Several necessary requirements of such procompetitive regulation are particularly important for evaluation of the proposals before the Commission:

First, independence in pricing is the cornerstone of competition. In unregulated markets, including most of the markets in which rail shippers operate, prices may be set independently by manufacturers, suppliers and retailers for the service that each provides. Even though cooperation by different firms is frequently essential in getting finished goods and services to the market, independent pricing power is still exercised or is the basis for negotiations leading to prices set by coordinated ventures.

Second, pricing in competitive markets is responsive to demand conditions. Such responsiveness to demand is critical to the efficient allocation of resources. It assures the availability of capital and other inputs to those activities whose outputs clearly justify their costs, and denies such inputs to activities whose benefits do not outweigh their costs.

Third, competitive prices are those that in the long run just permit the most efficient competitors to cover the total

costs they must incur in supplying the services desired by customers. If, unlike what happens in competitive markets, prices are artificially held by regulation below the costs of efficient supply of a particular service or set of services, in the long run those services will not be supplied, while in the short run the quality of those services and the efficiency with which they are provided can be expected to deteriorate.

Similarly, if prices are artificially forced above competitive levels or other means are used to protect inefficient firms from the competition of their more efficient rivals, the public will have to pay the excess cost and the economy will suffer from the resulting waste of resources.

* * * *

3. Procompetitive regulation is regulation which promotes these competitive precepts. To the greatest degree possible, it permits firms to set independent prices at levels that are based on demand conditions and that cover their firms' total costs when they operate efficiently. Procompetitive pricing regulation only restricts a dominant firm's freedom (a) to set rates which induce shippers to use inefficient combinations of services, or (b) to charge unreasonably high rates (*i.e*, rates which yield monopoly profits), or (c) to adopt rates which can serve as instruments of predation. These are the only types of regulatory interference in price setting that are justified, since they correspond to the ways in which a firm's pricing behavior can conflict with the public interest.

* * * *

It bears emphasizing that the one potential source of pervasive inefficiency in the pricing of interrailroad services is the presence of well-intentioned but inappropriate regulation which prevents the forces of competition and self interest from inducing the parties to reach voluntary agreements that promote the public interest. Not only the occurrence of such intervention, but even just the

threat that such intervention can be elicited if negotiations break down between two vertically related railroads, may suffice to undermine the possibility of agreement. If either of the parties believes it can gain from such regulatory intervention, its interests may best be served by unrealistic and unacceptable pricing offers which, while giving the appearance of genuine bargaining, in fact insure that no mutually acceptable agreement can be reached. Thus, it is only where ill-advised regulation freezes archaic relationships or requires continued provision of services at rates that have no economic justification, or where it can realistically be hoped by some parties that reimposition of such regulation can be elicited, that pervasive incentives for inefficiency arise.

* * * *

Another point which should be emphasized is that the cancellation of a particular joint rate can never in itself be inefficient or anticompetitive, provided that the cancelling railroad offers to establish a competitive through rate in its place. It is only the rates that remain, or are set, after cancellation that may have anticompetitive effects. In fact, given past regulatory practices, the widespread cancellation of joint rates in itself inherently tends to be procompetitive, since it permits the replacement of archaic, involuntary joint rates and divisions by the independent pricing of individual services that is fundamental to the efficient working of the competitive mechanism.

* * * *

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 445 (Sub-No. 1)

INTRAMODAL RAIL COMPETITION

EXCERPTS FROM THE
REPLY VERIFIED STATEMENT OF
WILLIAM J. BAUMOL AND ROBERT D. WILLIG

(July 5, 1985)

* * * *

We, along with most economists and regulators who have studied the subject, believe that the ultimate test for effective competition is economic efficiency. An effectively competitive market is a market in which (1) the relative prices charged by *competing* suppliers of goods and services encourage customers to patronize the least-cost (*i.e.*, efficient) suppliers of each good and service; (2) the relative prices charged for *different* goods and services accurately reflect relative scarcity, thereby enabling consumers (and society) to maximize the social welfare available from scarce economic resources; and (3) efficient firms have the opportunity, in the long run, to cover overall cost and earn returns equal to their cost of capital, thereby encouraging optimal levels of capital investment. Competition is desirable not because it safeguards the interests of individual competitors, but because it produces benefits for consumers in terms of price, efficiency and product quality.

* * * *

True competition is not enhanced by arrangements that ensure the simultaneous presence of a multiplicity of firms, but do so by means entailing inefficiencies, excessive prices or other forms of damage to the public interest. For example, a form of regulation that forces the most efficient enterprise in an industry to charge prices well above its incremental costs may well succeed

in preserving that firm's less efficient competitors, and so it may expand the number of enterprises in the industry above what it would otherwise have been. But, contrary to superficial appearance, this procedure is no stimulus to competition. On the contrary, it stultifies the competitive forces and entails a heavy cost to consumers. It is surely contradictory to what advocates of true competition have in mind.

The uneconomic imposition of through routes and joint rates can be precisely analogous to the spurious competitive policy that was just described. If it entails limiting the payments received by one railroad whose facilities are to be used by a second railroad so that the process involves an implicit subsidy to the latter, then this second railroad may find it profitable to continue to carry some or all of the traffic in question whether or not its presence is warranted by the relative efficiency of its service. The coexistence of a multiplicity of enterprises will be preserved, but only by means of an interfirm cross-subsidy which is a clear impediment to economic efficiency and consumer welfare.

* * * *

[T]he proposal we espouse here constitutes a vehicle for the general promotion of economic efficiency and the public interest. The central standard of the AAR/NITL/CMA proposal is composed of two elements—a set of rules against anti-competitive behavior, and, under the protective umbrella of those rules, reliance upon the market mechanism to yield beneficial results from a system of voluntary negotiations. Voluntary negotiations can, of course, lead to undesirable results if one of the parties is in a position to use them successfully as a device to stifle competition, that is, as a predatory instrument. Predation is highly unlikely in the rail industry.*

* * * *

* Predation involves three separate and necessary elements: (1) a firm takes action as a result of which it sustains losses or foregoes profits for some limited period of time; (2) those losses must be so substantial and of such duration as to force the exit of some of the firm's current competitors or to forestall the activities of a firm or firms that would otherwise have undertaken business in competition with the predator; and (3) the departure of these rivals must be necessary and sufficient to permit the incumbent to raise prices sufficiently after its rivals' exodus from the market to raise prices sufficiently above the competitive level and to sustain such excessive prices for a period of time sufficient to yield monopoly profits that exceed the losses incurred in driving the rivals from the field. In the absence of any one of these three elements, the alleged predator will have nothing to gain by attempting to drive a rival from the field through a profit sacrifice, for the attempt will either be doomed to failure or it will be incapable of producing rewards sufficient to justify the undertaking.

So long as revenue shares are allocated by the competitive interactions of rail carriers with the right to price independently, each railroad has a strong incentive to cooperate with other carriers that can provide service more cheaply than the railroad can supply it itself. In the absence of regulated revenue shares, a railroad has a strong incentive to pay enough to a cooperating carrier, or to allow a cooperating carrier a sufficient revenue share to permit it to cover its costs, provided only that the cooperating carrier is the efficient choice for the job. This follows because the rail carrier would earn less from its alternatives—either doing the job itself at a higher cost, compensating a less efficient cooperating carrier for its higher costs, or forgoing the service entirely and thereby losing its own portion of the net revenues available from the service.

* * * *

In these circumstances, each of the parties in a voluntary negotiation over the terms of a vertical relationship such as a joint route will earn the greatest profit available to it if it selects as its partner, in each transaction, the entity that is in a position to carry it out most efficiently and cheaply. Railroad I benefits by directing the traffic over the tracks of Railroad II, rather than over its own single line route, when Railroad II can do the

job more efficiently, thereby avoiding the unnecessary expenditure of revenue offered by the market for the transportation service.

* * * *

This generalization can be brought down to earth by consideration of its implications for the revenue shares that will emerge from voluntary negotiations in the long run. Suppose Railroad I has determined, on the basis that has just been reviewed, that it is more profitable for certain traffic to flow over the joint route than over its competing single line route. Then it would surely not serve Railroad I's long run interests to insist (even if it were in a position to do so) on a sharing arrangement which compensated Railroad II so badly that it would jeopardize Railroad II's continued operation or threaten the efficiency of Railroad II's activities. In a system of market constrained voluntary negotiations effectively screened from anticompetitive behavior (*i.e.*, predation), each of the vertically related partners has a critical stake in the continued operation and continued efficiency of the most efficient source of the vertically related services available to it.

* * * *

The entire matter can be reduced to common sense and its practicality can be made clear by a simple observation. Railroad I's choice between a through route and its own single line route is precisely analogous to a make-or-buy decision in a manufacturing industry. Should a manufacturer of portable radios make its own batteries or should it purchase them from others? That is precisely the same as Railroad I's choice between the use of Railroad II's facilities or its own to traverse a part of the route, that is, to provide a component of the final transportation product. It is obvious why, when the market for batteries is competitive, it is generally agreed that the market forces will lead the radio maker to arrive at the correct make-or-buy decision, that is, to select the most efficient producer of batteries.

* * * *

CURRICULUM VITAE OF PROFESSOR WILLIAM J. BAUMOL

BSS College of the City of New York, 1942
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1942-1943 and 1946: Junior Economist, U.S. Department of Agriculture
1947-49: Assistant Lecturer, London School of Economics
1949—Department of Economics, Princeton University (Professor since 1954)
1971—Department of Economics, New York University (Professor)
Current: Joint Appointment, Professor of Economics, Princeton and New York Universities

Awards and Honors:

1953 Fellow, Econometric Society
1957-58 Guggenheim Fellow
1965 Honorary LL.D., Rider College (Trustee Emeritus)
1965-66 Ford Faculty Fellowship
1968 Joseph Douglas Green 1895 Professor of Economics, Princeton University
1970 Honorary Fellow, London School of Economics
1971 Member, American Academy of Arts and Sciences
1971 Honorary Doctorate, Stockholm School of Economics
1973 Honorary Doctor of Humane Letters, Knox College
1973 Honorary Doctorate, University of Basel
1975 John R. Commons Award, Omicron Delta Epsilon
1975 Townsend Harris Medal, Alumni Association of the City College of New York
1977 Member, American Philosophical Society
1982 Distinguished Fellow, American Economic Association
1984 Distinguished Member, Economic Association of Puerto Rico
1986 Winner, Association of American Publishers 1986 Award for Best Book in Business, Management and Economics for *Superfairness: Applications and Theory*

1987 Recipient, Frank E. Seidman Distinguished Award in Political Economy
1987 Member, National Academy of Sciences

Professional Activities:

Member, Advisory Board, Price Institute for Entrepreneurial Studies
Member, Advisory Committee, World Resources Institute
Member, Editorial Advisory Board, Supreme Court Economic Review
Member, Board of Trustees, Joint Council on Economic Education
Member, Advisory Committee, Center for Entrepreneurial Studies, Graduate School of Business Administration, New York University
Member, Joint Advisory Committee on Behavioral Economics of the Russell Sage Foundation and the Alfred P. Sloan Foundation
Past President, American Economic Association
Past President, Eastern Economic Association
Past President, Association of Environmental and Resource Economists
Past President, Atlantic Economic Society
Past Chairman and Member, Economic Policy Council, State of New Jersey
Past Chairman, Committee on Economic Status of the Profession, American Association of University Professors
Past Vice President, American Association of University Professors
Various times on Board of Editors of *American Economic Review*, *Journal of Economic Literature*, *Management Science*, and *Kyklos*
Director, Consultants in Industry Economics, Inc.
Various consulting activities for government and industry.

Books Published:

Economic Dynamics, 1951; 2nd edition, 1959; 3rd edition, 1970.

Welfare Economics and the Theory of the State, 1952; 2nd edition, 1965.

Economic Processes and Policies (with L. V. Chandler), 1954.

Business Behavior, Value and Growth, 1959; 2nd edition, 1966.

Economic Theory and Operations Analysis, 1961; 2nd edition, 1965, 3rd edition, 1972; 4th edition, 1976.

The Stock Market and Economic Efficiency, 1965.

Performing Arts: The Economic Dilemma (with W.G. Bowen), 1966.

Precursors in Mathematical Economics: An Anthology (with S. M. Goldfeld), 1968.

Portfolio Theory: The Selection of Asset Combinations, 1970.

Economics of Academic Libraries (with M. Marcus), 1973.

The Theory of Environmental Policy (with W. E. Oates), 1975; 2nd edition, 1988.

Economics, Environmental Policy, and the Quality of Life (with W. E. Oates and S. A. Batey Blackman), 1979.

Economics: Principles and Policy (with A. S. Blinder), 1979; 2nd edition, 1982; 3rd edition, 1985; 4th edition, 1987.

Public and Private Enterprise in a Mixed Economy (editor), 1980.

Contestable Markets and the Theory of Industry Structure (with R. D. Willig and J.C. Panzar), 1982; revised edition, forthcoming.

Inflation and the Performing Arts (editor with H. Baumol), 1984.

Productivity Growth and U.S. Competitiveness (editor with K. McLennan), 1985.

Superfairness: Application and Theory, 1986.
Microtheory: Applications and Origins, 1986.
Productivity Performance: The Long View (with Sue Anne Batey Blackman and Edward N. Wolff), forthcoming.

Plus numerous journal articles.

SHERMAN ANTITRUST ACT

Section 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

No. 90-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,

—against—

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

Other Authorities

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BRIEF IN OPPOSITION

Respondent, Delaware & Hudson Railway Company ("D&H"), submits this brief in opposition to the petition for a writ of certiorari.[1]

PRELIMINARY STATEMENT

Petitioner, Consolidated Rail Corporation ("Conrail"), seeks review by this Court of the decision of the court of appeals below by resorting to an abstract and, at times, confusing description of its policies challenged by D&H as viola-

1 The disclosures of corporate affiliation required by Sup. Ct. R. 29.1 are set forth in the Appendix ("Resp. A." 1A) to this brief.

tive of the antitrust laws. This abstraction by Conrail of its anticompetitive actions (1) obscures the intent and effect of those actions and (2) largely ignores the record upon which the court of appeals affirmed the finding of the district court that there was "relatively clear proof of Conrail's monopolistic intent" (*Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 724 F. Supp. 1073, 1077 (N.D.N.Y. 1989)) and remanded for trial the issue of whether Conrail's pricing policies were anticompetitive in intent and effect. Instead, Conrail asks this Court to make sweeping determinations with respect to antitrust law in general and the essential facilities doctrine in particular. When viewed in light of the record and the decision below, it is evident that this case presents no conflicts with other decisions, significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

D&H brought this action against Conrail alleging that, in or about 1980, Conrail embarked upon a course of action intended to eliminate D&H as a competitor in the railroad industry by forcing out railroads operating in competition with its routes, thereby monopolizing one or more markets for the rail transportation of freight in the Eastern Territory in violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (West Supp. 1989).[2] Specifically, D&H, which is essentially surrounded by Conrail's Congressionally bestowed 17,000 miles of trackage, challenges as anticompetitive, first, Conrail's outright refusals to concur in joint rates with D&H[3]

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2 The "Eastern Territory" is a rate-making territory comprised generally of the New England, Middle Atlantic and Midwestern states to the east of the Mississippi River.

3 As the court of appeals noted:

> A joint rate is a cooperative rate—less than the sum of the separate rates of the individual railroads—charged to the shipper when the

and, second, its so-called "make or buy" policy. D&H alleges that under the "make or buy" policy Conrail would concur in joint rates with D&H only if D&H would agree to give it a division of revenue that would allow Conrail to receive the same profit over its short haul route (the route involving D&H) as it would receive over its long haul route (the route that does not involve D&H). D&H alleges that these policies effectively prevented D&H access to the relevant market (the movement of newsprint from Eastern Canada to the mid-Atlantic states) since only Conrail had trackage serving the consignees.[4]

Following the completion of discovery, Conrail moved for summary judgment on May 2, 1988. On June 20, 1988, before it had responded to Conrail's motion, D&H filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On November 20, 1989, after D&H's response to Conrail's motion, the district court granted Conrail's motion for summary judgment in its entirety. On April 20, 1990, the court of appeals vacated the judgment of the district court and remanded the action. The court held that "there are genuine issues of material fact with respect to whether the development and implementation by Conrail of its make or buy policy constituted the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization." *Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990) (Petition Appendix ("A.") 11a).

Not surprisingly, Conrail's Statement of the Case omits any significant references to the actual effect Conrail's refusals to concur in joint rates and its "make or buy" policy

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> shipment requires the use of the tracks of two or more railroads. Each railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks.

902 F.2d at 177 (A. 3a).

4 D&H also alleges that Conrail has attempted to monopolize in violation of Section 2 of the Sherman Act.

had on D&H and the shippers D&H serves. Instead, Conrail engages in a theoretical discussion of that policy which bears virtually no resemblance to the facts of this case and which concludes, loftily, that the "make or buy" policy will result in efficient resource allocation for the economy as a whole. (Pet. at 3.) Conrail fails to mention, however, that D&H, by virtue of the fact that it needed Conrail's concurrence in joint rates in order to serve shippers in the relevant market at all, had either to accede to Conrail's demands for a share of the revenue produced over the joint routes totally disproportionate to Conrail's participation in those routes or lose its ability to serve shippers at all. As the court of appeals noted, "Conrail's action placed D&H in a bind between giving up almost all of its profits on a given route [or] losing entirely the ability to carry freight on a given route." 902 F.2d at 177 (A. 4a).[5] Moreover, where Conrail flatly refused to concur in joint rates, D&H was simply prevented from carrying freight in the relevant market at all.

Conrail ignores the clear implications of its policies and, instead, argues that it is simply seeking to sweep away the vestiges of regulation in the railroad industry to which it claims D&H is clinging.[6] As the decision below makes manifest (902 F.2d at 176-77 (A. 2a-5a)), Conrail, rather than being a product of "legitimate, efficiency-enhancing . . . procompetitive practices" (Pet. at 13), was created by Congress, was bestowed by Congress with its dominant trackage position and was subsidized by Congress in the amount of $3.3 billion during its early, unprofitable years. UNITED STATES RAILWAY ASS'N, CONRAIL AT THE CROSSROADS: THE FUTURE OF RAIL SERVICE IN THE NORTHEAST 2 (1981) ("Conrail at the Crossroads"). Now, suddenly, Conrail

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5 Contrary to Conrail's assertions, this result is plainly evident from the record below. *See infra* pp. 10-11.

6 On the contrary, D&H has expressed willingness to negotiate new divisions with Conrail. As noted above, however, Conrail has either refused to concur in joint rates with D&H or has offered economically prohibitive terms for concurrence.

would have us believe it is a paradigm of success through competition.

Congress provided for the creation of Conrail in the early 1970's in order to respond to a mounting crisis in the rail industry. At that time, many rail carriers in the Northeast and Midwest were bankrupt. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-09 (1974). Congress sought to alleviate that crisis by passing the Regional Rail Reorganization Act of 1973 (the "3R Act"). Pub. L. No. 93-236, 87 Stat. 98b, 45 U.S.C.A. §§ 701-791(m) (West 1987). The 3R Act provided for the creation of the United States Railway Association (the "USRA"), which was instructed to create a financially self-sustaining rail system by reorganizing the bankrupt railroads. 45 U.S.C.A. § 716(a)(1) (West 1987).

Pursuant to those instructions, the USRA was to draft a Final System Plan which, among other things, was to be formulated in such a way to effectuate "the retention and promotion of competition in the provision of rail and other transportation services in the region." 45 U.S.C.A. § 716(a)(5). Accordingly, USRA's draft of the Final System Plan called for at least two competitive carriers in the Northeast and Midwest, Conrail and the Chessie System, each of which was to be composed of a substantial number of rail lines operated by the bankrupt railroads. 1 USRA, FINAL SYSTEM PLAN FOR RESTRUCTURING RAILROADS IN THE NORTHEAST AND MIDWEST REGION PURSUANT TO THE REGIONAL RAIL REORGANIZATION ACT OF 1973 at 3, 5 (1975).

Chessie was ultimately unable to negotiate labor agreements with the Erie Lackawanna unions and therefore declined to become a major competitor for Conrail, as contemplated by the Final System Plan. Conrail at the Crossroads at 2; *Norfolk & Western Railway Co. and New York, Chicago and St. Louis R.R. Co.—Merger*, 363 I.C.C. 270, 279 (1980). The revised Final System Plan thereafter gave Conrail most of the bankrupt lines that had first been offered to Chessie. Conrail at the Crossroads at 2. As a result,

"D&H became at once virtually surrounded by the proposed Conrail system and the only major possible source of competition with it." *Norfolk & Western Railway*, 363 I.C.C. at 279.[7]

Faced with the legislative behemoth it had created, Congress sought to create competition for Conrail by granting D&H trackage rights over Conrail's lines. However, this did little to alleviate the stronghold Conrail had over D&H. As the court of appeals noted, "D&H . . . controlled about 1,700 miles of track at its peak, while Conrail controls about 17,000. Conrail does not challenge the fact that, as a result of the disparity, D&H is forced to rely on Conrail's system in order to compete." 902 F.2d at 176 (A. 2a-3a).

In addition to bestowing the market dominance Conrail now enjoys, Congress, in 1980, enacted the Staggers Rail Act (the "Staggers Act"). Pub. L. No. 96-448, 94 Stat. 1895. The Staggers Act was "intended to ensure the development of a sound rail transportation system by moving the industry toward more aggressive competition, pricing innovation, and adequate revenues." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3999. These goals were to be achieved through deregulation. Under the Staggers Act, rates would not have to be approved by the Interstate Commerce Commission (the "I.C.C.") unless they fell above or below certain levels. 49 U.S.C.A. §§ 10701a, 10709 (West Supp. 1989); *see also Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 654 F. Supp. 1195, 1198 (N.D.N.Y. 1987) (A. 33a). Thus, as Conrail notes, railroads were essentially free of regulatory restraint as regards their participation in joint rates.

Nevertheless, and contrary to Conrail's assertions, this freedom from regulatory restraint did not mean that railroads could act without regard for the provisions of the antitrust

7 "Following the advent of Conrail, the Erie-Lackawanna, Lehigh Valley, Central Railroad of New Jersey, and, indirectly, the Reading Railroad Company were absorbed [by Conrail] and lost as friendly connections." *Norfolk & Western Railway*, 363 I.C.C. at 283.

laws. Indeed, given the disparity in size and strength as among the railroads, Congress was concerned that the larger railroads (and, in particular, Conrail) would utilize their right to cancel or negotiate joint rates in an anticompetitive fashion. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4090. For instance, where traffic could move over two routes, both involving Conrail, Conrail could cancel the joint rate for the route over which its smaller competitor had to run its trains, thus forcing that route to be priced at a higher "combination rate." As a result, traffic from the smaller competitor's route would switch to Conrail's other route, thereby eliminating the smaller railroad as a competitor.

Given the concerns of Congress, Representative John M. Murphy proposed an amendment to the Staggers Act making it clear that the antitrust laws would apply to any anticompetitive cancellation of joint rates:

> I plan to support an antitrust amendment to section 301, borrowing from the familiar language of the Clayton Act, to provide that it shall be unlawful for any carrier . . . to cancel the application of a joint rate to a through route where the purpose or effect of such . . . cancellation may be substantially to lessen competition or tend to create a monopoly . . . .

H.R. Rep. No. 1035, 96th Cong., 2d Sess. 221 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4103. Congressman Murphy expressed his concerns as follows:

> [S]ection 301 of the bill dealing with joint rates is self-defeating, in my view, and threatens irretrievable harm to small and medium-sized railroads and the shippers, receivers, States, communities and ports they serve. . . . De-regulation . . . which may be appropriate elsewhere can be devastating in the case of railroads. Unlike aircraft, trucks and ships which can move when and where they will, rail cars can move only where there are tracks to carry them. *Since 70 percent of all rail traf-*

fic is interlined . . . railroads are uniquely interdependent and must cooperate if we are to have an efficient national rail network . . . .

H.R. Rep. No. 1035, 96th Cong., 2d Sess. 218 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4100 (emphasis added).[8]

Conrail's Chairman and Chief Executive Officer, Edward G. Jordan, assured Congress that any anticompetitive perversion of the joint rate proposals contained in the Staggers Act could be dealt with under existing antitrust laws:

> Under either of the [joint rate] proposals made by Conrail, however, monopolization would be prevented. If the antitrust laws are applied, treble damage awards with criminal penalties would be available to prevent abuse of market power.

Railroad Deregulation Act of 1979: Hearings Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 405 (1979). Congressman Murphy recognized that his proposed amendment was essentially a "reaffirm[ation]" of the "usual applicability of the antitrust laws", 1980 U.S. Cong. & Admin. News at 4103, and the House and Senate conferees satisfied themselves that existing antitrust law provisions were sufficient to deal with any predatory cancellations of joint rates:

> The conferees note that nothing in the bill's protections reduces the availability of the Federal antitrust laws to protect against improper use of the . . . cancellation provisions [of the Staggers Act].

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8 In addition, Representatives Dingell and Eckhardt specifically stated:

> [T]his section as written into the bill would sanction the exploitation of monopoly traffic by large railroads among shippers and among connection railroads, and a "big stick" approach to resolving of equities as between large and small railroads.

1980 U.S. Code Cong. & Admin. News 3978, 4090.

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4114.

Having argued that existing antitrust laws would protect its smaller competitors from anticompetitive manipulation of the joint rate provisions of the Staggers Act, Conrail now argues that it is entirely free to make demands for exorbitantly high divisions of revenue before it will concur in joint-rates because it is merely attempting to "maximize its profits." (D&H remains at a loss to understand how the maximization of profits, undoubtedly the object of every anticompetitive action, begins to serve as justification for Conrail's actions.)

Conrail attempts to justify its actions under its "make or buy" policy by describing them in terms sufficiently abstract to disguise that policy's intent and effect and make them blend nicely with the rhetoric of procompetitive activity. However, Conrail's actions with respect to D&H were readily described by both parties and the courts below. As the court of appeals noted:

> An example used by the district court and by *both parties* in their briefs may illustrate the parties' relationship: A newsprint shipper seeks to have newsprint delivered from a point in Quebec, Canada, to Lancaster, Pa. There are two relevant options. One option would entail delivery via a Canadian railroad to Conrail's border facility. Conrail then would carry the cargo on its tracks for the entire journey. Under the other option, after receiving the cargo at its border facility, D&H would carry the cargo on its tracks only as far as Harrisburg, Pa. From there, it would have to complete the journey on Conrail's tracks.

902 F.2d at 176-77 (A. 3a) (emphasis added). Conrail "would agree to the [latter route] only if its profit, called contribution, matched its profit on the route where it was the sole American carrier." 902 F.2d at 177 (A. 4a). Thus, as the court of appeals noted, the policy had the same effect as an outright refusal to cooperate by Conrail.

This net effect of the "make or buy" policy is evident from the example utilized by the court of appeals below:

> The effect of the make or buy policy can be demonstrated by reference to the example referred to above. On a Quebec-Lancaster carriage entirely on Conrail tracks, Conrail would earn $30,000 in revenue, less $20,000 in costs, for a contribution of $10,000. Prior to the make or buy policy, Conrail's revenue for the Harrisburg-Lancaster short haul route, when D&H was responsible for the long haul, would be $2,000 less costs of $750, for a contribution of $1,250. The make or buy policy was intended to assure that Conrail would receive the same contribution for any carriage in which it participated, whether it was the short or long haul carrier. Accordingly, under its new policy, Conrail demanded a contribution of $10,000 for the Harrisburg-Lancaster short haul route, an increase of 800%. The price for D&H's failure to agree to those terms was the denial by Conrail of any joint rates.

902 F.2d at 177 (A. 4a).

Contrary to Conrail's assertions, the court of appeals did not err by using that example because it was simply seeking to demonstrate the *effect* of the "make or buy" policy and was not relying upon it to create a material issue of fact. *Id.* Indeed, the court of appeals noted that the example had been used by the district court and by *both* parties in their briefs. 902 F.2d at 176 (A. 3a). In fact, that example was first advanced by Conrail in the district court. 724 F. Supp. at 1077 (A. 21a). Moreover, Conrail, while objecting to the hypothetical example used by the court of appeals, continues to use hypothetical examples to illustrate its points with respect to the "make or buy" policy. (Pet. at 5 n.5.)

In any event, the record below more than adequately supports the inferences drawn in the hypothetical example. Indeed, the court of appeals made reference to one actual instance of the implementation of the "make or buy" policy which clearly verifies the court's hypothetical. In the instance

alluded to by the court of appeals, a pricing analyst for Conrail concluded that the application of the "make or buy" policy to a joint route for the movement of traffic originating in Canada for delivery in the United States to consignees accessed only by Conrail would result in a division of revenues "ludicrously low" from the point of view of D&H. 902 F.2d at 178-79 (A. 7a). Accordingly, there was more than enough evidence in the record to support the inferences drawn in the hypothetical example used by the court of appeals and to support the court of appeals' finding that a question of fact had been raised as to the exclusionary intent and effect of Conrail's policy.

In addition, Conrail's contention that "the rail industry supports the make-or-buy approach" (Pet. at 8) is incorrect for several reasons. First, the notion that D&H could employ the "make or buy" policy in the fashion that Conrail did is ludicrous. D&H, by virtue of the fact it is surrounded by Conrail trackage, would never have direct access to consumers of newsprint and could not present other railroads with the Hobson's choice that Conrail presents D&H under the "make or buy" policy. Second, Conrail can point to no evidence in the record to support the contention that the rail industry supports the "make or buy" approach. Instead, Conrail relies upon *dicta* contained in a factually distinguishable I.C.C. decision to support its contention. (Pet. at 7-8). There is nothing in Conrail's treatment of that case, *Guilford Transportation Industries, Inc.—Control—Boston and Maine Corp.*, 5 I.C.C.2d 202 (1989), or in that decision itself, to suggest that that case bears any resemblance to this situation. There is no suggestion in *Guilford* that any of the railroads involved in that dispute enjoyed the Congressionally conferred monopoly position of Conrail or a stranglehold upon the competitor in question.[9] In any event, a finding by the

9 The other examples Conrail cites to support its contention that the "make or buy" policy has been accepted by the rail industry must also be rejected because they are nothing more than the opinions of experts

I.C.C. as to the anticompetitive effect of the "make or buy" policy is hardly binding on an antitrust court and Conrail's attempt to have this matter referred to the I.C.C. has already been rejected by the district court below on Conrail's motion to dismiss the complaint.[10]

The Decision Below

After failing in its bid to have D&H's complaint dismissed, and after the completion of fact discovery, Conrail moved for summary judgment on all of D&H's claims. On November 20, 1989, notwithstanding recognition of the "relatively clear proof of Conrail's monopolistic intent," 724 F. Supp. at 1077 (A. 19a), the district court granted Conrail's motion for summary judgment dismissing D&H's monopoly claims. On April 20, 1990, the court of appeals vacated the judgment of the district court and remanded the action to that court. Upon review of the record, the court of appeals found "there is evidence which would support a jury finding that Conrail is liable for monopolization" and consequently concluded there were genuine issues of material fact precluding summary judgment. 902 F.2d at 178 (A. 7a). In addition, the court of appeals found, in light of the evidence presented in the affidavit of D&H's expert, Gordon H. Fay, that D&H presented a genuine issue of material fact as to monopoly

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hired to present the views of only certain parties in I.C.C. proceedings that differ substantially from this case and, therefore, do not constitute the views of the industry as a whole.

10 The district court stated:

> In the final analysis, however, this court has the responsibility to find the facts and apply them to the law of antitrust. While efforts by the ICC may be helpful to the court in carrying out that responsibility, that aid is overshadowed by other considerations . . . . The court is confident that it can marshall the facts as adequately from materials submitted on such motions [for summary judgment] as from ICC documents. Moreover, any legal consideration provided by the ICC may not be suitable to the antitrust analysis.

Delaware & Hudson Railway Co. v. *Consolidated Rail Corp.*, 654 F. Supp. 1195, 1203 (N.D.N.Y. 1987) (A. 43a).

power. 902 F.2d at 179 (A. 8a). Finally, the court of appeals disagreed with the district court's conclusion that the terms of the "make or buy" policy were reasonable as a matter of law and concluded that there were genuine issues of material fact with respect to whether Conrail's development and implementation of the "make or buy" policy constituted the denial of the use of an essential facility to D&H. 902 F.2d at 180 (A. 10a-11a).

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THIS CASE DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED BY THIS COURT IN *ASPEN SKIING CO.* V. *ASPEN HIGHLANDS SKIING CORP.* NOR WITH ANY OTHER DECISION

The decision below vacating the grant of summary judgment by the district court did not turn on the resolution of any significant questions of law. Rather, the court below rejected Conrail's narrow and contrived interpretation of *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and applied the legal standards enunciated by this Court in *Aspen* to the facts of this case. Consequently, the court of appeals' decision does not warrant this Court's attention because it was entirely consistent with *Aspen*. Moreover, it presents no conflicts with any other decisions of this Court or any other court of appeals.

In *Aspen*, the plaintiff, Aspen Highlands Skiing Corp. ("Highlands"), operated one of four ski mountains in the Aspen, Colorado area. The defendant, Aspen Skiing Company ("Ski Co."), operated the other three. For a number of years, Highlands and Ski Co. had offered an interchangeable ski lift ticket that could be used on any of the four mountains. They had allocated between themselves the revenues from the interchangeable ticket on the basis of actual use of

the four mountains. During the 1970's, however, Ski Co.'s management became dissatisfied with the interchangeable four-area ticket because they felt it was "siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued." 472 U.S. at 592. As a result, Ski Co. refused to offer the interchangeable ticket for the 1978-1979 season unless Highlands would agree to accept a share of the revenues "considerably below Highlands' historical average based on usage." 472 U.S. at 592. After Ski Co. refused to negotiate its position, Highlands rejected the proposed revenue division. Ski Co. then proceeded to market a new interchangeable ticket that was good only on its three mountains, and not on that of Highlands. Highlands' share of the market for downhill skiing declined steadily after the four-area ticket was abolished. 472 U.S. at 594.

On appeal from a jury verdict finding it had monopolized the market for downhill skiing in Aspen by refusing to jointly market the four-area ticket, 472 U.S. at 595, Ski Co. argued, as Conrail does here, that it had no duty under Section 2 of the Sherman Act to cooperate with its competitors. 472 U.S. at 600. While this Court accepted Ski Co.'s contention that a firm with monopoly power has no absolute duty to engage in a joint marketing program with a competitor, it held, nevertheless, that the right to refuse to deal is qualified:

> The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

472 U.S. at 600 (footnote omitted). In the context of this legal predicate, this Court went on to state:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

472 U.S. at 603. While this Court found that a decision "by a monopolist to make an important change in the character of the market . . . is not *necessarily* anticompetitive," 472 U.S. at 604 (emphasis added), this Court held that the jury had been correctly and "unambiguously instructed that Ski Co.'s refusal to deal with Highlands 'does not violate Section 2 if valid business reasons exist for the refusal . . . .' " 472 U.S. at 604-05. Whether Ski Co. was prompted in its actions by legitimate business concerns or exclusionary intent was clearly an issue of fact for the jury and the Court, after its review of the trial record, concluded that the record "comfortably supports an inference that [Ski Co.] made a deliberate effort to discourage its customers from doing business with its smaller rival." 472 U.S. at 610.

In its review of the trial record, this Court held that the conduct of Ski Co. should be assessed in terms of its "effect . . . on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself." 472 U.S. at 605. In these regards, this Court found, first, that "the evidence supports the conclusion that the consumers were adversely affected by the elimination of the 4-area ticket" in that the skiers "demonstrably preferred four mountains to three." 472 U.S. at 606. Second, and as is the case here, this Court found that the adverse impact of Ski Co.'s pattern of conduct on Highlands was undisputed. 472 U.S. at 607. Finally, as to the effect of the challenged conduct on Ski Co. itself, this Court found that the jury could have reasonably concluded that the actions of Ski Co. could not be justified by any legitimate business reason. In this connection, Ski Co. had argued that its activities were prompted by a "desire to disassociate itself from—what it considered—the inferior skiing services offered by Highlands." 472 U.S. at 609-10. This Court, however, noted that the record supported a conclusion that Ski Co. was foregoing short-term ticket sales generated by the four-area ticket program and found that the "jury may well have concluded that Ski Co. elected to forego these short-term benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor."

472 U.S. at 608. As a result of this analysis, this Court concluded that the evidence in the record was "adequate to support the verdict under the instructions given by the trial court" and affirmed the decision of the court below. 472 U.S. at 611.

While no two cases are exactly alike, *Aspen* and the challenged activities of the defendant there are about as analogous to the instant case as one could imagine. As in *Aspen*, the cancellation of joint rates and the application of the "make or buy" policy by Conrail constituted "an important change in a pattern of distribution" of transportation services. 472 U.S. at 603. Second, Conrail claims that its actions were prompted by legitimate business purposes and not by exclusionary intent. (Pet. at 13.) As in *Aspen*, this contention, at best, raises an issue of fact within the province of a jury. Moreover, the "legitimate business purpose" claimed by Conrail does not have even the colorable legitimacy of the claim in *Aspen* that Ski Co. did not want to associate with a competitor offering inferior services. Here the "legitimate business purpose" advanced by Conrail as justification for its conduct is the maximization of profit. (Pet. at 17.) Presumably any monopolist, no matter how exclusionary its conduct, has, among its purposes, the maximization of revenues and profits. As the court of appeals found, "[t]he fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, *but does not shield the policy from judicial scrutiny*." 902 F.2d at 178 (A. 7a) (emphasis added).

Moreover, this Court made it clear in *Aspen* that the factual issue of whether a monopolist's actions can "properly be characterized as exclusionary" necessarily involves an analysis of the effect of the conduct on consumers, on the competitor, and on the monopolist itself. 472 U.S. at 605. D&H presented evidence below sufficient to raise material issues of fact under this tripartite test.

First, as to the impact of Conrail's refusals to concur and its "make or buy" policy on consumers, the record below is

clear. The deposition testimony of Michael Behe, Conrail's Line of Business Unit Manager for Forest Products in 1982, indicates that Conrail harmed shippers by ignoring their preferences. Behe testified that although certain shippers had proposed reduced rates for newsprint traffic originating in Canada so that they could compete with other shippers who had been given a reduced rate, Conrail refused because each of those proposed routes included D&H. (Resp. A. 3A-4A.) Similarly, Mr. Behe instructed an analyst not to concur in a request for reduced rates where he had noted the traffic was "all going [via] D&H currently." (Resp. A. 4A.) In addition, the elimination of D&H from certain routes harmed shippers because Conrail was no longer forced to compete on the basis of anything other than price, such as speed and quality of service.

Second, it was uncontested below, and the court of appeals found that "there is no question that D&H was harmed by the implementation of the [make or buy] policy." 902 F.2d at 179 (A. 7a). As noted above, D&H has filed for protection under Chapter 11 of the Bankruptcy Code.

Third, D&H has indeed put forth evidence that Conrail elected to forego short-run benefits in order to harm D&H. In one example to which the court of appeals alluded, "James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits." 902 F.2d at 178 (A. 7a). Thus, this case is no different from *Aspen* in which Ski Co. was willing to forego daily ticket sales to certain skiers with the hope that its policy of refusing to include Highlands in its joint ticket package would eventually drive all Highlands' customers to Ski Co.

In any event, Conrail, unlike Ski Co., had no need to forego short-run benefits in order to eliminate D&H as its competitor. Conrail could achieve all it wanted simply by refusing to concur in rates over routes that would include D&H. In *Aspen*, this Court found it necessary to consider

Ski Co.'s decision to forego short-run benefits because Highlands, in an effort to keep some skiers on its mountain, proposed alternative ski packages which it hoped would be as attractive to skiers as Ski Co.'s package. Here, however, D&H could propose no alternatives. Once Conrail refused to concur in rates over routes which included D&H, D&H could no longer compete.

Despite the clear congruity between *Aspen* and the instant case, Conrail insists that somehow the "court of appeals misapplied *Aspen*." (Pet. at 17.) Proceeding from the premise "that a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification", 902 F.2d at 178 (A. 6a) (citing *Aspen*, 472 U.S. at 605), Conrail argues that the court of appeals, having "acknowledged that the make-or-buy policy promoted efficiency", erred in concluding that "the [make or buy] policy could be held unlawful based on evidence it characterized as showing anticompetitive intent." (Pet. at 17.) The court of appeals, however, reached no such conclusion with respect to whether the "make or buy" policy promoted efficiency. Quite to the contrary, the court of appeals simply indicated that here, as in *Aspen*, a question of fact existed as to whether the "make or buy" policy had been implemented for legitimate business purposes or with exclusionary intent and effect. 902 F.2d at 178 (A. 7a). Moreover, and also much as in *Aspen*, the court of appeals found that an issue of fact was presented as to whether the "make or buy" policy had been implemented regardless of "whether or not it increased Conrail's profits." 902 F.2d at 178 (A. 7a). This Court in *Aspen* indicated that the foregoing of short-term profits by a monopolist for allegedly predatory purposes supported an inference by the jury that the defendant's actions were anticompetitive in both intent and effect. 472 U.S. at 608. Finally, the court of appeals did not, as Conrail suggests (Pet. at 17), equate monopolistic intent with anticompetitive behavior. Rather, the court held that the clear evidence of Conrail's monopolistic intent coupled with

behavior which, like the behavior in *Aspen*, could be fairly construed as anticompetitive raised an issue of fact for trial.

Our review of the record in the instant case satisfies us that there is evidence which would support a jury finding that Conrail is liable for monopolization. Here are a few examples: First, James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits. Second, several Conrail employees, including its President, Stuart M. Reed, stated that a shift of D&H's traffic to Conrail would be desirable. Third, David Kalapos, an analyst for Conrail, stated that D&H would be unlikely to concur in a joint rate under the make or buy policy as its profits "would be almost ludicrously low." Fourth, there is no question that D&H was harmed by the implementation of the policy. D&H introduced in evidence a letter from a Conrail vice president stating "I'm for a monopoly in total! . . . So let's Conrail take and rationalize the entire D&H."

We agree with the district court that the vice president's letter, standing alone, would not give rise to a § 2 violation. Ocean State Physicians Health Plan v. *Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1 Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990); *Olympia Equipment Leasing Company* v. *Western Union Tel. Co.*, 797 F.2d 370, 373, 379 (7 Cir. 1986) (intent that "these turkeys . . . be flushed" did not give rise to liability), *cert. denied*, 480 U.S. 934 (1987). *In view of the evidence referred to above, however, we hold that D&H has proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated § 2.* Obviously, therefore, this issue could not properly be decided against D&H on a motion for summary judgment.

902 F.2d at 178-79 (A. 7a-8a) (emphasis added). This evidence both of Conrail's intent and its behavior were at least as compelling as the evidence of anticompetitive intent and behavior in *Aspen*.

In addition, the analysis applied by the court of appeals is entirely consistent with the allegedly "conflicting" decisions of the First, Fifth, Seventh and Ninth circuits which petitioner cites. (Pet. at 18-19.) Those decisions—two of which do not cite to *Aspen* at all—simply confirm that the court below correctly applied the standard enunciated by this Court in *Aspen*.

Conrail contends the decision below conflicts with the decisions of other courts of appeals because those courts held "that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent." (Pet. at 18.) Conrail bases its contention on a faulty premise, however. Conrail presumes, again, that the court of appeals held that Conrail's "make or buy" policy was a legitimate business practice because profit maximization was a goal of the policy. On the contrary, and as noted above, the court of appeals merely held that this proposition *lends support* to the argument that the policy was legitimate but stated that "[a] monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits." 902 F.2d at 178 (A. 7a).

Moreover, many of the cases cited by Conrail were decided in a factual and legal context that differs entirely from the context of this case. For instance, both *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) and *A.A. Poultry Farms, Inc.* v. *Rose Acres Farms Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1326 (1990), involved allegations that the defendants engaged in predatory pricing in violation of Section 2 of the Sherman Act. In each of those cases, the courts of appeals rejected the plaintiffs' contentions because they found no evidence that the price reductions were predatory (in that they were, in fact, higher than

the defendants' costs) and, accordingly, held that proof of intent to eliminate a competitor was insufficient to form the basis for liability in a predatory pricing case. 881 F.2d at 1402; 724 F.2d at 232.

In *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), the plaintiff, Olympia Equipment Leasing Co. ("Olympia"), a new firm in the telex equipment market, argued that it could not effectively compete in the market without the aid of Western Union's salesmen. The court found, in contrast to *Aspen*, that "there is a clear business justification in this case: Western Union wanted to liquidate its supply of telex terminals faster, so it stopped promoting a competitor's supply." 797 F.2d at 378. It further distinquished *Aspen* by noting that Olympia, unlike Highlands (which could not acquire other mountains in order to compete with Ski Co.), had other means of competing in the market because it could hire salesmen to substitute for the Western Union sales force. Accordingly, it determined that Western Union did not engage in exclusionary conduct and held that its expressed intent that "these turkeys be flushed" was irrelevant. 797 F.2d at 373, 379. In the present case, D&H, unlike Olympia, did not have an alternate route for transporting the Canadian newsprint. D&H had to obtain Conrail's concurrence in joint rates in order to compete with Conrail. Therefore, under the reasoning enunciated in both *Aspen* and *Olympia*, the court of appeals was justified in concluding that a jury might find Conrail's behavior to be exclusionary.

In *Ocean State Physicians Health Plan Inc.* v. *Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990), a Health Maintenance Organization ("HMO") and a class of the HMO's participating physicians brought an action against an alleged monopolist health insurer, Blue Cross, challenging the insurer's "prudent buyer" policy pursuant to which the insurer refused to pay the physicians more for a particular service than the physicians were accepting from the HMO. The HMO alleged

that this policy had an exclusionary effect on it because a significant number of physicians withdrew from the HMO causing it to be excluded from the health insurance marketplace. The Court of Appeals for the First Circuit rejected this contention and held that "such a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits and, as a matter of law, is not exclusionary." 883 F.2d at 1110. The court of appeals further stated "[a]s long as Blue Cross's course of conduct was itself legitimate, the fact that some of its executives hoped to see Ocean State disappear is irrelevant." 883 F.2d at 1113. In the present case, in contrast to *Ocean State*, Conrail was not seeking to receive lower prices from D&H; it was asking D&H to give up almost all of the revenues on a given route so Conrail could maximize its profits. D&H, unlike the physicians in *Ocean State* who were already accepting lower prices from the HMO, could not continue to exist with the revenues Conrail was proposing it accept. Indeed, the court of appeals noted that even Conrail admitted that under one application of the "make or buy" policy its revenues would be "ludicrously low." 902 F.2d at 178-79 (A. 7a). Thus, there was sufficient evidence in the present case, in addition to evidence of intent, to warrant the court of appeals' conclusion that a jury could find that the "make or buy" policy was not a legitimate business practice.

Finally, in *Oahu Gas Service, Inc.* v. *Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), the Court of Appeals for the Ninth Circuit concluded that the defendants had legitimate business reasons for deciding not to expand its refinery to permit propane production (i.e., "the investment required of [defendant] would have resulted in a negative return") and thus rejected plaintiffs' antitrust claim because it was based on nothing more than plaintiffs' contention that the defendant acted as it did because it wanted to increase its market share. It found, as the court of appeals did here, "the desire to maintain or increase one's market share is not in itself an antitrust violation, of course." 838 F.2d at 368. The present case may be

distinguished from *Oahu*, because Conrail, unlike the defendant in *Oahu*, would not have incurred losses if it had concurred in joint rates with D&H.

In addition, while Conrail cites *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988) for the proposition that "the existence of a legitimate business justification has a 'preclusive effect' against antitrust liability even if there is anticompetitive intent" (Pet. at 18), it neglects to note that *Bell* actually supports the court of appeals' decision in this case. In *Bell*, plaintiff sought relief under Section 2 of the Sherman Act for defendant's refusal to sell its product to plaintiff. The court of appeals found that the district court erred when it held that plaintiff "failed to offer any evidence that [the defendant's] actions were motivated by a monopolizing purpose" because it found that plaintiff "offered significant evidence undercutting the credibility of the [business] justifications offered by [defendant]." 847 F.2d at 1186 (quotation omitted). Inconsistencies abound in the present case. Indeed, Williams' statement, "I'm for monopoly in total" (quoted at 902 F.2d 179 (A. 7a)), is directly at odds with Conrail's purported business justification for its actions. Moreover, Conrail, both publicly and internally, has indicated that it would like to take over the property and traffic of D&H.[11] Nevertheless, Conrail argues that all of these actions can be justified solely because their goal is profit maximization, a goal, no doubt, of all anticompetitive activity. Because D&H has proffered more than enough evidence to contradict this assertion, the court of appeals' decision reversing the summary judgment of the district court was correct.

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11 In fact, Stuart Reed, the President of Conrail in 1981, in opposing subsidies to the D&H, notwithstanding its own receipt of much more significant subsidies, stated that "a shift of D&H's traffic to Conrail would be desirable." 902 F.2d at 178 (A. 7a). *See also* CONRAIL, OPTIONS FOR CONRAIL, CONRAIL'S RESPONSE TO SECTION 703(c) OF THE STAGGERS RAIL ACT OF 1980, EXECUTIVE SUMMARY at 8 (April 1, 1981).

II.

REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE COURT BELOW APPLIED THE ESSENTIAL FACILITIES DOCTRINE IN A MANNER WHICH IS CONSISTENT WITH SECTION 2 OF THE SHERMAN ACT

Conrail argues that review by this Court is warranted since "[t]his case . . . clearly presents the question whether the essential facilities doctrine permits recovery that would otherwise be unavailable under Section 2 [of the Sherman Act]." (Pet. at 22-23.) Conrail's contention is flawed in two serious regards. First, the decision of the court of appeals with respect to the essential facilities doctrine was merely an alternative ground to its holding that an issue of fact had been raised for trial under this Court's holding in *Aspen*. Second, the essential facilities doctrine, especially as applied in the instant case, is clearly nothing more than classic Section 2 analysis applied to discrete fact situations involving monopolists who control access to a particular market.

As to the latter point, the essential facilities doctrine holds that a monopolist "which controls a scarce facility has an obligation to give competitors reasonable access to it." *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979). The doctrine originated in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), a case in which the defendant group of railroads owned the terminal facilities that were needed by all railroads to access the city of St. Louis. The Court held that the owner railroads violated Sections 1 and 2 of the Sherman Act because they did not provide non-owner railroads with reasonable, non-discriminatory access to the facilities. 224 U.S. at 411-12. If competitors had no access to the terminal facilities, competition would have been precluded:

> The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies are under compulsion to use the terminal sys-

> tem, and yet have no voice in its control . . . . [T]he situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure upon that fact. The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities.

224 U.S. at 404-05.

Given the "most extraordinary . . . situation" in *Terminal Railroad* (a situation not at all unlike the one confronted by D&H), *Terminal Railroad* does not constitute the slightest departure from mainstream Section 2 analysis. Indeed, the language of *Terminal Railroad* is completely consistent with the most often cited articulation of the elements of a Section 2 claim. In *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), this Court held that the elements of a Section 2 monopolization claim were "(1) the possession of monopoly power in the relevant market and (2) the willful acquiescence or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." 384 U.S. at 570-71. Surely the actions of the defendants in *Terminal Railroad* easily satisfy both elements of the *Grinnell* test. It is equally clear that Conrail, whose control of access to the relevant market was Congressionally created, must grant reasonable access through its essential facility to the relevant markets or fall within the proscriptions of *Grinnell* and *Terminal Railroad*. The consistency between *Terminal Railroad* and *Grinnell* was recently articulated in *Soap Opera Now, Inc.* v. *Network Publishing Corp.*, 737 F. Supp. 1338 (S.D.N.Y. 1990):

> Although it is clear that a separate test is applied in evaluating claims under the essential facilities doctrine, this Court finds it analytically more helpful to conceive

of the essential facilities doctrine as constituting not a distinct claim under Section 2 but instead either as a form of or evidence of a firm's "willful acquisition or maintenance" of monopoly power in satisfaction of the second element of a monopolization claim, or in certain situations as an element of an attempt claim.

. . . [A]lthough the doctrine has never been explicitly relied on by the Supreme Court, in those cases in which the Supreme Court has found a duty on the part of a single firm to share an essential product or service with its competitors, it has done so either under the rubric of the second prong of the *Grinnell* monopolization test [citing *Aspen*, *supra*] . . . or as constituting an attempt to monopolize. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 . . . . *see also* [*Terminal Railroad*, *supra*].

737 F. Supp. at 1343.[12] In addition to its argument that the essential facilities doctrine is somehow not consonant with Section 2, Conrail also draws a distinction between essential facilities cases which focus on the effect of the essential facility on competitors as opposed to consumers. (Pet. at 25-26.) As was the case with a similar argument made with respect to the Section 2 claim under *Aspen*, this distinction is largely artificial and hardly has the implications that Conrail suggests. First, this Court plainly held in *Aspen* that the appro-

12 In its petition, Conrail cites to *Illinois Bell Telephone Company* v. *Haines and Company, Inc.*, 905 F.2d 1081 (7th Cir. 1990) (a case that has been stayed by this Court) after stating that "[o]ther courts of appeals have followed these Section 2 principles in rejecting essential facilities claims." (Pet. at 24 n.2.) At no time does the *Illinois Bell* court reject the essential facilities doctrine as "departing from settled Section 2 law". (Pet. at 24.) In fact, the court noted that the plaintiff's "allegations may be evidence of an essential facility claim". 905 F.2d at 1087. The *Illinois Bell* court merely held that the plaintiff's allegations "do not go to specific intent for an attempt to monopolize claim." 905 F.2d at 1087. Unlike the *Illinois Bell* plaintiff, D&H does not ask that this Court use the elements of the essential facilities doctrine as evidence of intent. Other evidence is available to indicate Conrail intended to monopolize. *See* 902 F.2d at 179 (A. 7a).

priate focus in any Section 2 claim clearly involves the effect on competitors, although certainly not to the exclusion of effect on consumers:

> The question whether [the monopolist's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.

472 U.S. at 605. Second, any efforts by the courts under the antitrust laws to protect competitors from the exclusionary actions of monopolists inures to the benefit of consumers by promoting healthy competition.

As clear as it is that the application by the court of appeals of the essential facilities doctrine is perfectly consonant with Section 2 analysis, it is equally clear that, at an absolute minimum, D&H raised issues of fact for trial as to whether the conduct of Conrail violated that doctrine. Four elements are necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing access to the facility. *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). As stated by the District of Columbia Court of Appeals in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), "[t]o be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."

The elements of the essential facilities doctrine are present in the instant case. With respect to the first element of the claim, the essential facility here is Conrail's tracks. Canadian newsprint travelling over D&H's routes must interchange over Conrail's short haul route to reach its destination. D&H and

the Canadian carriers must obtain Conrail's concurrence in rates over through routes where only Conrail has access to the consignees.

With respect to the second element of the essential facilities doctrine, it is beyond dispute that duplication of Conrail's rail lines would be superfluous, improvident and economically ruinous. *Cf. Consolidated Gas Co. of Fla.* v. *City Gas Co. of Fla.*, 655 F. Supp. 1493, 1534 (S.D. Fla. 1987), *aff'd* 880 F.2d 297 (11th Cir. 1989) (In considering the feasibility of the duplication of the major distributor's pipeline, the district court determined, "the cost involved . . . [is] highly supportive of a finding that such facilities cannot be reasonably duplicated.") This facility could only have been "duplicated" if Conrail allowed D&H the use of Conrail's tracks. As respects the fourth element, the feasibility of Conrail supplying access to D&H, there is no dispute as to this element in that Conrail has previously granted D&H such access.

With respect to the final element of the essential facilities doctrine, an unreasonable offer by a company to allow a competitor to use its facilities may be viewed as a refusal to deal at all. *Consolidated Gas*, 655 F. Supp. at 1534. In *Consolidated Gas*, a major distributor of natural gas, City Gas, controlled "an essential facility—a pipeline that transported wholesale gas." 655 F. Supp. at 1534. In that case, the court found that the pipeline could not have been duplicated. As a result, it considered whether the third element of the essential facilities test had been met, *i.e.*, whether City Gas had denied the use of the pipeline to its competitor. It found that the charges proposed by City Gas were economically unreasonable. 655 F. Supp. at 1534. It is, thus, clear that when the courts require "reasonable" access to an essential facility, they mean "reasonable" in an economic sense viewed from the point of view of the competitor. As the *Terminal Railroad* court stated:

> Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such

> just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Terminal Railroad, 224 U.S. at 411. At a bare minimum, it is clear that the application of the "make or buy" policy (and the outright refusal to concur in joint rates in some instances) raises an issue of fact for trial as to whether D&H has not effectively been denied access to the facility.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: October 10, 1990

Respectfully submitted,

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APPENDIX

Rule 29.1 Listing

Respondent, Delaware & Hudson Railway Company, is a wholly owned subsidiary of Guilford Transportation Industries, Inc. On June 20, 1988, the Delaware & Hudson Railway Company filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. With the following exceptions, all of the subsidiaries of the Delaware & Hudson Railway Company are wholly owned by it:

1. Albany and Vermont Railroad Company;
2. Albany Port Railroad Corporation;
3. Napierville Junction Railway Company; and
4. Saratoga and Schenectady Railroad Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION

86-CIV-810

(Judge McCurn)

DELAWARE AND HUDSON RAILWAY COMPANY,

Plaintiff,

—vs.—

CONSOLIDATED RAIL CORPORATION,

Defendant.

Philadelphia, Pennsylvania
Wednesday, September 16, 1987

Deposition of MICHAEL R. BEHE, held at the Offices of Drinker, Biddle & Reath, 1100 Philadelphia National Bank Building, on the above date, at 10:00 a.m., before Ruth M. Martin, a Registered Professional Reporter, Notary Public, and an Approved Reporter of the United States District Court

* * *

[182] Michael Behe

* * *

a number of Pennsylvania locations from St. Joseph D'Alma via routes that are listed at the bottom of the page.

Have you ever seen a copy of that before?

A. I believe I have.

Q. At or about the time it was received at Conrail?

A. I would say so, yes.

Q. I think you indicated earlier that it was your recollection that this request for reduced rates from St. Joseph D'Alma was part of the CN rate reduction program that we've been discussing earlier?
A. Yes, I would agree with that.
Q. Was it usually the case in this business that once a reduced rate was put into effect for newsprint traffic from certain Canadian mills, that the competitive mills in the area sought similar reductions for their traffic?
A. Definitely sought those same reductions, yes.
Q. This particular request at the bottom of the second paragraph requests rates which CN states represented eighty-eight percent of the Section 1 [183] commodity rates in CFAE Tariff 4660-B. What does that refer to?
A. The tariff, as I recall, is the—CFAE, for instance, is Canadian Freight Association East, and that tariff, I believe, is the tariff that the newsprint rates to the Official Territory are published in.
Q. And what does the reference to commodity rates refer to?
A. I assume they're referring specifically to rates applying to newsprint paper located in the first section of the tariff.
Q. Was CN requesting that Conrail agree to rates which were eighty-eight percent of the rates in effect at that time for this traffic?
A. That's what I recall, yes.
Q. The routes which are requested by CN, set forth in the bottom of the page, all involve D&H routes through either Allentown, Harrisburg or Wilkes-Barre. Correct?
A. Yes.
Q. And there is a circle around D&H in each of those routes and a notation, non-concur 12-27 CR response. Do you see that?

[184] A. Yes.
Q. Whose writing is that?
A. The non-concur I believe is mine. The notation immediately under it, I would—I believe that's Mr. Winton's.
Q. The notation non-concur that appears at the bottom?
A. I believe that's mine as well.

MR. ZEMAITIS: I just want to make sure—

Q. Which notations are those of Mr. Winton?
A. The date 12-27 and whatever that says below the date.
Q. CR response?
A. Yes.
Q. All right. Did that represent your instruction to Mr. Winton not to concur to the proposed D&H routes?
A. Yes.
Q. And take a look at 214, which is the form of a wire dated December 27, 1982, over your name to CN Rail. Did you cause that wire to be prepared and sent to the CN?

* * *

[202] * * *

Q. Stating non-concur. Right?
A. Uh-huh.
Q. Is that your instruction to your analyst to issue a non-concurrence to this request over the D&H routes?
A. Yes.
Q. And moving to Exhibit 230, which is a telex dated the same date, again from Mr. Grece to you requesting your concurrence to the same reduced rates for the same destinations, but via CN-Huntington-Conrail, did you receive a copy of that telex at about this time?
A. Yes, I believe so.
Q. Once again this route of CN-Huntington-Conrail to these destinations would represent Conrail's long haul for this traffic?
A. Yes.
Q. There are some handwritten notations on this document. To the right of the destinations and rates there is the reference you referred to earlier which states, all going D&H currently. Do you know whose handwriting that is?
A. That might be mine.
Q. And by that were you saying that this

* * *

(3)

No. 90-380

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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Dated: October 22, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

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1. By sidestepping the central issue raised in the Petition ("Pet."), the Brief in Opposition ("Opp.") of Delaware and Hudson Railway Company ("D&H") underscores the need for this Court to review the seriously flawed decision of the court of appeals. Petitioner Consolidated Rail Corporation ("Conrail") asks the Court to resolve this question: Does Section 2 of the Sherman Act, 15 U.S.C. § 2, require a vertically integrated firm that allegedly has monopoly power and that buys components of its output from non-integrated competitiors only when the cost of buying a component is less than the integrated firm's cost of making that component, to sacrifice profits and efficiency by purchasing the competitor's component when it costs more? D&H does not question the importance of this issue or that it is ripe for review. Nor does D&H present any credible support for the decision of the court of appeals that Section 2 can compel Conrail to

purchase D&H's service even when doing so would be more expensive than providing that service itself.

2. D&H seeks to justify the decision below by turning on its head this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). D&H incorrectly maintains that *Aspen* supports the court of appeals' remarkable proposition that Section 2 imposes liability whenever a monopolist's conduct harms only a competitor, whether or not that conduct harms competition, i.e., consumers.[1] The central message of *Aspen*, however, is that a Section 2 plaintiff can establish liability only if it shows that defendant's conduct impaired competition in an unnecessarily restrictive way—" 'on some basis other than efficiency.' " *Aspen*, 472 U.S. at 605 (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). Indeed, it is a principle of long standing that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 478 (1977) (emphasis in original; *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Thus, the court of appeals radically departs from, rather than builds upon, the Court's teaching in *Aspen*.

D&H also seeks (Opp. at 16) to draw a parallel with *Aspen* by asserting that Conrail's undisputed justification of short-run profit maximization for its make-or-buy policy somehow equates to the complete lack of justification offered by Skiing Co. for conduct that sacrified short-run

[1] Recognizing that *Aspen* cannot be contorted in this way, D&H makes a passing attempt to show evidence in the record of harm to consumers from Conrail's make-or-buy policy. Opp. at 16-17 & 2A-4A. However, in the very example to which D&H refers, Conrail followed its uniform policy: In response to a request from Canadian National Railway proposing to lower a newsprint rate, Conrail concurred in the lower rate on the routes where it had a direct connection with Canadian National because that conduct maximized Conrail's profit. Thus, consumers could receive the lower rate by shipping via Conrail; they could not receive the lower rate on routes including D&H because D&H was unwilling to reduce its divisions.

benefits. *See Aspen*, 472 U.S. at 608-11. But even the court of appeals acknowledged that "[t]he fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice . . . ." Pet. App. at 7a.[2]

Finally, D&H argues that this case is like *Aspen* because it also involves a situation where the defendant made "an important change in a pattern of distribution." Opp. at 16 (quoting *Aspen*, 472 U.S. at 603). D&H ignores that, in *Aspen*, the Court considered this change important because the earlier pattern of distribution "had originated in a competitive market." *Aspen*, 472 U.S. at 603. D&H does not dispute that the historic divisions of revenue among railroads, which it seeks to perpetuate, originated under a regulatory scheme subsequently repudiated by both Congress and the Interstate Commerce Commission. *See* Pet. at 5-8.

3. D&H also seeks to harmonize the court of appeals' erroneous resolution of the question left open in *Aspen*—"whether non-exclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anti-competitive purpose," 472 U.S. at 611 n.44—with the contrary decisions from other courts of appeals discussed in the Petition (pp. 18-20). That effort is unavailing. Nothing D&H says can alter the court of appeals' conclusion that legitimate, profit-maximizing conduct can nevertheless run afoul of Section 2 if there is evidence of anti-competitive intent. Nor can D&H escape the direct conflict between the court of appeals here and those courts that have held that evidence of intent is irrelevant once

[2] It is firmly established that profit maximization is a legitimate business justification as a matter of law, even if pursued by a firm with monopoly power and even if the firm hopes that its conduct will take business away from competitors. *See* Pet. at 18-21; *United States Football League v. National Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988) ("[A] monopolist . . . is free to set as its legitimate goal the maximization of its own profits . . . .").

the court determines that the conduct at issue does not harm competition.

4. D&H's defense of the court of appeals' application of the "essential facilities" doctrine also points up the need for this Court's review. According to D&H, the firm controlling a facility deemed "essential" must offer access on reasonable terms, with "reasonable" defined "in an economic sense viewed from the point of view of the competitor." Opp. at 28. Under this formulation, it is irrelevant that furnishing access on terms reasonable from D&H's point of view would require Conrail to subsidize D&H and sacrifice profits.[3] This application of the "essential facilities" doctrine, if allowed to stand, would provide an escape hatch for plaintiffs who cannot establish monopolization under traditional Section 2 principles.

5. Throughout its Opposition, D&H intimates that there are disputed factual issues as to Conrail's intent that both justify the court of appeals' decision and warrant denial of Conrail's Petition. But the facts material to the legal issue presented in the Petition are undisputed. D&H admits that Conrail applied the make-or-buy policy "so Conrail could maximize its profits." Opp. at 22. Moreover, as the district court recognized, D&H has never been able

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[3] D&H relies on *Consolidated Gas Co. v. City Gas Co.*, 655 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *aff'd en banc*, No. 87-6109, slip op. (11th Cir. Sept. 19, 1990) (to be reported at 912 F.2d 1262). The serious misapplication of Section 2 by the court of appeals in *Consolidated Gas*, like the court of appeals here, further underscores the need for this Court to address the issues raised by the Petition. In his dissent from the court's *en banc* affirmance, Chief Judge Tjoflat recognized the potential for serious economic and legal dislocations when the "essential facilities" doctrine is interpreted to condemn conduct that is legitimate under traditional Section 2 analysis. Slip op. at 5176-84. He also recognized the extraordinary problems posed in fashioning a remedy when a monopolist offers access to the "essential" facility on "unreasonable" terms. *Id.* at 5183, 5196-206. Indeed, defining reasonable terms of access "forces the courts to adopt the role of a regulatory agency, an agency charged moreover, with an impossible task and facing a set of never-ending problems." *Id.* at 5206.

to identify an instance in which Conrail refused to concur in joint rates with D&H where concurrence would have been more profitable for Conrail than nonconcurrence. Pet. App. at 23a. Thus, no additional factual development by the district court could illuminate further the legal issues that Conrail's Petition raises.[4]

The court of appeals' decision that Conrail's application of its make-or-buy policy—a policy that concededly maximizes profits in the short run—could violate Section 2 of the Sherman Act departs markedly from the decisions of this Court and the other courts of appeals. Accordingly, Conrail's Petition should be granted.

Respectfully submitted,

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Dated: October 22, 1990

[4] D&H refers to the court of appeals' mischaracterization of the deposition testimony of a Conrail official to argue that there was "evidence that Conrail elected to forego short-run benefits." Opp. at 17. Even if accurately interpreted—which it was not, *see* Pet. at 10-11 n.17—this statement of intent does not constitute conduct, nor does it rebut the undisputed record showing Conrail's unwavering application of its make-or-buy policy.

(4)

No. 90-380

In the Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

DELAWARE & HUDSON RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a lawful monopolist has a duty to deal with a rival on terms allowing the rival a reasonable profit without regard to the effect on competition of a refusal to deal on such terms.

2. Whether the court of appeals held that a monopolist's anticompetitive intent can transform otherwise lawful conduct into a violation of Section 2 of the Sherman Act.

3. Whether the "essential facilities" doctrine provides a basis for holding that a monopolist must make a facility available to a competitor at a particular price solely to assure that the competitor earns a profit satisfactory to it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Consolidated Rail Corporation (Conrail) and respondent Delaware & Hudson Railway Company (D&H) carry freight in the northeastern United States. Congress created Conrail in response to the financial collapse of regional railroads in the 1970s, combining several rail systems into one system with about 17,000 miles of track. D&H, both older and smaller, has only about a tenth as much track. Pet. App. 2a, 15a.

Because of D&H's smaller size, its tracks do not reach the termini necessary to serve many northeast recipients of newsprint shipped from Quebec. D&H's routes to these recipients, therefore, must employ Conrail's tracks for part of the journey. In contrast, Conrail can serve these same customers over its own tracks without using those

of D&H. All of these newsprint routes originate on the tracks of Canadian railroads. Pet. App. 2a-3a.

Rail shipments involving the tracks of multiple railroads are conventionally subject to "joint rates" (single rates charged to shippers for the entire shipment), with the revenues divided among the railroads involved according to a particular "division." Pet. App. 3a. Historically, rail regulation served to assure that shipping rates were equal over all routes between two given points.[1] The division of revenues between carriers participating in joint routes, however, might differ between routes. Divisions were determined either by negotiations among the railroads or by Interstate Commerce Commission prescription.

In prescribing divisions, the starting point, and sometimes the ending point, was the mileage of each railroad participating in the joint rate: "As a general rule where operating conditions are substantially similar, the straight mileage pro-rate is accepted as a fair basis for dividing joint rates." *Louisville Board of Trade* v. *Indianapolis, C. & S. Traction Co.*, 34 I.C.C. 640, 642 (1915), quoted in Teagarden, *The Federal Government and Railroad Rate Division: Policies and Practices*, 55 Transp. Prac. J. 15, 18 (1987). The Transportation Act of 1920, ch. 91, 41 Stat. 456, provided for ICC determination of "just, reasonable, and equitable divisions" and specified factors to be considered in determining divisions, including the efficiency of the carriers, their revenue requirements, and other facts "which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less

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[1] "The principle * * * is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points." *A.J. Poor Grain Co.* v. *Chicago, Burlington & Quincy Ry.*, 12 I.C.C. 418, 423 (1907). See also *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 376 (7th Cir. 1983) ("Although the routes are different, the origin, destination, and commodity are the same, so the joint rates almost certainly would have to be the same to avoid violating the prohibition against rate discrimination in 49 U.S.C. § 10741(a).").

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proportion than another carrier of the joint rate." 49 U.S.C. 15(6) (1976) (repealed).[2] That provision of the Transportation Act "was designed for affirmative use in relieving the financial needs of weak carriers." *United States* v. *Great Northern Ry.*, 343 U.S. 562, 569 (1952), citing *The New England Divisions Case*, 261 U.S. 184, 189-195 (1923). Nevertheless, divisions continued to be based in substantial measure on mileage. *E.g., Chicago & N.W. Ry.* v. *A., T, & S.F.R.R.*, 387 U.S. 326 (1967) (weighted mileage).

The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, substantially deregulated railroad rates. Pet. App. 3a, 16a. Nonetheless, prior to 1982, the joint rates and divisions applicable to Quebec newsprint destined for the eastern United States were the ones set under the pre-Staggers Act regulatory regime. Conrail and D&H's rates on alternative routes between any given two points were equal, and the divisions apparently were roughly in proportion to mileage. Pet. App. 32a.[3]

In 1982, the Canadian Pacific Railroad and the Canadian National Railroad, faced with increasing competition from trucks, proposed lower joint rates for newsprint. Conrail accepted the Canadian proposals for lower joint rates on routes for which it was the only American rail carrier but rejected them for routes also involving

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[2] Substantial portions of 49 U.S.C. 15(6) (1976) have been carried forward into current law. See 49 U.S.C. 10705(c). However, the "just, reasonable, and equitable" standard of 49 U.S.C. 15(6) (1976) has been replaced by a different standard: "Divisions of joint rates * * * must be made without unreasonable discrimination against a participating carrier and must be reasonable." 49 U.S.C. 10701(a).

[3] Although the record does not indicate the preexisting divisions between Conrail and D&H, it gives no reason to suppose they were not roughly in proportion to mileage. The parties do not controvert the court of appeals' statement (Pet. App. 3a) that "[e]ach railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks."

D&H. Following a "make or buy" policy,[4] Conrail indicated it would agree to a lower joint rate on the routes involving D&H only if the division were adjusted so that Conrail earned as much profit on the route involving D&H as it would on the route not involving D&H. Pet. App. 4a, 21a. Because the D&H portion of these routes was significantly longer than Conrail's, Conrail's proposal amounted to a significant shift in the preexisting divisions, to Conrail's benefit and D&H's detriment. D&H, faced with a choice "between giving up almost all of its profits on a given route and losing entirely the ability to carry freight on the route," *id.* at 4a, rejected Conrail's proposal.

2. D&H filed an antitrust suit against Conrail, alleging (as narrowed during litigation) that, in violation of Section 2 of the Sherman Act (15 U.S.C. 2), Conrail had monopolized and attempted to monopolize the transportation of newsprint from Eastern Canada to the mid-Atlantic states, primarily by adopting and implementing the "make or buy" policy. Pet. App. 15a-17a, 20a.

The district court granted summary judgment for Conrail. The parties agreed, for purposes of summary judgment, to the relevant product and geographic markets alleged by D&H, and the court presumed for purposes of its decision that Conrail had monopoly power in that market. Pet. App. 18a. The court also found, based on a single memorandum, "relatively clear proof of Conrail's monopolistic intent."[5] *Id.* at 19a. The court recognized,

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[4] According to Conrail, the make or buy policy "means that Conrail would not 'buy' a service (in this case, D&H's rail transportation for part of a shipment) if it could 'make' that service itself less expensively" and that "Conrail would not 'sell' its services below its profit-maximizing price." Pet. 3. As the court of appeals explained, "Under that policy, Conrail would agree to the reduced rate only if its profit, called 'contribution', matched its profit on the route where it was the sole carrier." Pet. App. 4a.

[5] The memorandum, from an assistant vice-president to the senior vice president for operations, included this statement: "I'm for monopoly in total! . . . So let's Conrail take and rationalize the entire D & H." Pet. App. 7a, 19a.

however, that intent alone did not suffice to convert monopoly power into unlawful monopolization. *Ibid.*

Relying on the jury instruction this Court approved in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985), the court concluded that the remaining issue was "whether Conrail's make or buy policy was a legitimate business practice, and therefore not violative of Section 2, or whether this program was exclusionary, and therefore impermissible under the [Sherman] Act." Pet. App. 20a. The court found that the policy maximized Conrail's profits as compared to a policy giving a larger share of the revenues to D&H. Stating that "[a] monopolist is not required to engage in practices which are less profitable than other, legitimate practices," the court concluded that the make or buy policy was a valid business practice and did not violate Section 2. Pet. App. 22a, citing *United States Football League* v. *National Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988).

Analyzing the same facts in light of the "essential facilities" doctrine, the court assumed that Conrail's tracks were an essential facility. It held, however, that D&H had failed to show that Conrail had unreasonably denied access to the tracks, because the make or buy policy, which set the terms under which Conrail would permit "access," was reasonable. Pet. App. 25a-26a. The court therefore granted summary judgment for Conrail on the monopolization claim.[6] *Id.* at 29a.

3. The court of appeals reversed. In its view, "whether Conrail's make or buy policy constituted willful anticompetitive conduct" presented a genuine issue of material fact. Pet. App. 6a. The court explained that although a profit maximization goal "provides support for an argument that the policy is a legitimate practice," *id.* at 7a, neither *Aspen* nor *United States Football League* held that conduct intended to maximize short-term profits can-

[6] The court also granted summary judgment for Conrail on the attempted monopolization claim, which rested primarily on the make or buy policy. Pet. App. 26a-28a.

not violate Section 2. Pet. App. 6a-7a. It then concluded that there was sufficient record evidence to support a jury finding of monopolization, and that the district court therefore had erred in granting summary judgment. Without cataloguing the evidence it deemed sufficient, the court gave, as examples, a statement by a former Conrail executive to the effect that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits"; statements indicating that several Conrail employees considered a shift of traffic from D&H to Conrail desirable; a statement indicating that a Conrail analyst believed that at least one joint rate under Conrail's make or buy policy would result in "almost ludicrously low" profits for D&H; the presumed harm to D&H from implementation of the policy; and the "monopoly in total" statement (see note 5, *supra*) on which the district court relied. Pet. App. 7a.

Treating the "essential facility" theory separately, the court concluded that Conrail's tracks were an essential facility, that duplication was impractical, and that it was feasible for Conrail to provide the facility to D&H. Accordingly, the court held that Conrail's denial of access, if "unreasonable," would constitute a violation of Section 2. Pet. App. 9a. The court then concluded that there was a genuine issue of material fact as to whether the terms of the make or buy policy were reasonable. In reaching this conclusion, the court relied on a hypothetical example constructed by the district court, *id.* at 22a n.7, as evidence that Conrail had, in effect, increased the price Conrail charged D&H for transporting a particular short haul by 800%.[7] *Id.* at 10a. "The magnitude of that increase," the court said, "may be sufficient in itself to create a triable issue as to whether the terms were unreasonable." *Ibid.* The court did not decide that issue, however, because it believed that "the various statements of Conrail executives" it had previously discussed "support our conclusion that there is a triable issue." *Ibid.*

[7] The record does not indicate whether 800% reasonably approximates any actual effective price increase in the market in question.

The court added that it need not determine "the circumstances under which a legitimate business practice will shield a defendant from liability for conduct that otherwise would constitute denial of an essential facility," because it had already determined that there was a genuine issue of material fact whether the make or buy policy was a "legitimate practice." *Id.* at 10a-11a.[8]

DISCUSSION

The central question in this case is whether Conrail's refusal to cooperate with its competitor in setting a joint rate on the basis of the traditional division was exclusionary conduct likely to injure competition.[9] The resolution of that issue turns on the competitive significance of Conrail's "make or buy" policy as applied in this case. In our view, D&H failed to "come forward with 'specific facts showing that there is a *genuine issue for trial*,' " *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)), as to any adverse effect on competition flowing from Conrail's conduct. Consequently, the court of appeals should have affirmed the district court's entry of summary judgment for Conrail.

Instead, for reasons that the court's opinion does not fully explicate, the court of appeals reversed and remanded the case for trial. On this record, the logical

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[8] The court also rejected Conrail's contention that D&H had failed to raise a genuine issue of monopoly power, Pet. App. 8a, and reversed the district court's grant of summary judgment on the attempted monopolization claim. *Id.* at 11a.

[9] The complaint in this case alleges both monopolization and attempted monopolization. Because the district court's grant of summary judgment rested on the holding that Conrail's conduct was not exclusionary, the court did not focus on the other elements of those offenses. Although Conrail challenged in the court of appeals the existence of monopoly power, Conrail does not renew that challenge here. Accordingly, without expressing a view on the issue, we will assume that Conrail has monopoly power. We will also address the nature of Conrail's conduct without distinguishing between monopolization and attempted monopolization.

implication of the court's holding appears to be that a lawful monopolist must deal with its business rival on terms that provide the rival with a reasonable profit, regardless of the effect of the monopolist's conduct on competition and consumers. That holding distorts the purpose of the Sherman Act, and warrants review by this Court. Although the decision below is interlocutory and the court of appeals' reasoning is not entirely clear, we believe that the court's treatment of a monopolist's obligation with respect to dealings with competitors represents a sufficiently serious departure from proper antitrust principles, in an area of potentially broad application, to justify this Court's intervention.

1. a. In *Aspen*, the Court upheld a jury determination that the refusal by the operator of three ski areas to cooperate with the operator of a fourth ski area in allowing the marketing of a four-area ticket was exclusionary conduct in violation of Section 2 of the Sherman Act.[10] The Court was careful to emphasize, however, that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." 472 U.S. at 600. Nor, the Court added, is the exclusionary character of a monopolist's conduct established solely by evidence that the refusal adversely affected the competitor. *Id.* at 605; see also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (antitrust laws enacted to protect competition, not competitors). To the contrary, the impact on consumers must be considered. 472 U.S. at 605; see also *American Academic Suppliers, Inc.* v. *Beckley-Cardy, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,296, at 65,091 (7th Cir. Jan. 17, 1991). The trier of fact must determine whether the challenged conduct has "impaired competition in an unnecessarily restrictive way," 472 U.S. at 605, which requires consideration of whether the firm has been "attempting to

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[10] The Court noted that conduct sufficient to constitute monopolization under Section 2 of the Sherman Act has variously been termed "exclusionary," "anticompetitive," or "predatory." 472 U.S. at 602.

exclude rivals on some basis other than efficiency." *Ibid.*, quoting R. Bork, *The Antitrust Paradox* 138 (1978).

Applying those principles, the Court in *Aspen* focused on the impact of the challenged conduct on competition. It concluded that the defendant's refusal to allow a four-area ticket to be sold denied consumers the opportunity to purchase a product that they valued highly. 472 U.S. at 605-607. Although the Court discussed the effect of that refusal on the plaintiff's ability to compete, it did not stop with an observation that the plaintiff's profits were reduced. Rather, it set forth the plaintiff's vigorous attempts, which the defendant thwarted, to develop alternatives that would allow the marketing of the four-area ticket that consumers desired. *Id.* at 607-608. Finally, the Court found confirmation for its conclusions in the defendant's failure to offer "any efficiency justification whatever for its pattern of conduct." *Id.* at 608. The defendant "did not persuade the jury that its conduct was justified by any normal business purpose." *Ibid.* Rather, the evidence supported an inference that the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-611.

b. In contrast to the Court's approach in *Aspen*, the court of appeals in this case failed to consider the impact on competition and consumers from Conrail's conduct and the efficiency justification that Conrail offered in its defense. Absent from the court's opinion is any suggestion that this record would support a finding that Conrail's conduct adversely affected competition. The court supplied no reason to believe that Conrail's conduct was inconsistent with short-run profit maximization, that consumers were denied the benefits of superior efficiency or deprived of valued services, or that prices were increased or output reduced. Instead, the implication of the decision is that D&H may prevail upon showing that it did not have the opportunity to make as much money as it would have if Conrail had been willing to agree to a lower joint rate on the basis of the traditional division. That

holding—which is our best reading of an opinion that is characterized by less than crystalline clarity—represents a distortion of basic antitrust principles. Moreover, in our view, this summary judgment record does not support characterization of Conrail's conduct as exclusionary.

(1) To begin with, there is no basis for a conclusion that any shipper paid more, or would pay more, or would receive less, because of Conrail's conduct. D&H cites nothing in the record to show that any shipper was unable to obtain rail transportation for newsprint from Canada to points in the eastern United States, or that any shipper was unable to obtain the reduced rate by shipping over Conrail's route.[11] D&H does not contend that Conrail's agreement to continue the traditional division would have allowed D&H and Conrail jointly to offer a lower rate than the Conrail rate; rather, D&H wanted the rates for the joint route and the all-Conrail route to be equal.

D&H asserts that "the elimination of D&H from certain routes harmed shippers because Conrail was no longer forced to compete on the basis of anything other than price, such as speed and quality of service." Br. in Opp. 17. But, as a threshold matter, neither the court of appeals nor D&H cites evidence in the summary judgment record indicating that Conrail's conduct deprived D&H of the ability to continue providing service on its alternative route, and thus eliminated it as a competitor. The court of appeals stated that "there is no question that D&H was harmed by the implementation of the policy." Pet. App. 7a. But the court did not assert that there is evidence—and D&H refers to none—demonstrating that the harm amounted to more than a diminution of

[11] D&H contends there is evidence indicating "that Conrail harmed shippers by ignoring their preferences" for reduced rates (Br. in Opp. 17, citing Opp. App. 3a-4a). But that evidence, to which the court of appeals did not refer, shows only that Conrail refused to concur in reduced rates over alternative routes involving D&H, not that shippers failed to receive reduced rates.

D&H's profits.[12] To the contrary, the court of appeals' opinion suggests that it assumed that D&H could have made at least some profit at the reduced rate, even on Conrail's terms.[13]

Even if we assume that D&H would have been unable to operate profitably under Conrail's proposed division, nothing in the court of appeals' opinion or in D&H's submissions suggests a reason for making the further, and critical, assumption that consumers were thereby disadvantaged.[14] D&H points to no evidence that any shipper preferred D&H over Conrail [15] or that D&H offered superior service in any respect. And D&H has not suggested that it made any attempt to negotiate a joint rate that afforded Conrail the contribution it demanded while leaving D&H a share sufficient to allow it to operate profitably. If D&H offered services that shippers

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[12] Although D&H sought protection under Chapter 11 of the Bankruptcy Code (six years after the events in question and two years after it filed this action), D&H offered no evidence that its insolvency directly resulted from Conrail's conduct, or even that its financial condition would not have been improved if it had entered into a joint rate with Conrail consistent with Conrail's make or buy policy.

[13] See Pet. App. 4a (D&H would have to give up "*almost* all of its profits on a given route" (emphasis added)). See also Pet. App. 7a (citing evidence that under the make or buy policy D&H profits "would be almost ludicrously low").

[14] "[T]he fact that a railroad discontinues a particular service offering is not necessarily a sign of diminished competition from a broad consumer-welfare standpoint. Although a shipper might in theory prefer one through route to another—maybe one is faster, and that was the one that has been 'closed'—in practice routing is almost always determined by the originating carrier rather than by the shipper. Time-sensitive shipments are rarely made by train; if the shipper wants speedy delivery he uses another mode." *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 377 (7th Cir. 1983).

[15] To be sure, there were shipments over D&H tracks prior to the rate reduction. But there is no evidence that the shippers, as opposed to the originating carriers (the Canadian railroads), selected the route, let alone cared which of two equally priced routes was selected.

valued and could not obtain from Conrail, then shippers presumably would have been willing to pay a higher rate to obtain joint D&H/Conrail service.

(2) Nor, in our view, did the court of appeals identify any evidence that would justify a trier of fact in concluding that Conrail's conduct is best understood as exclusionary rather than efficiency-based.[16] The court stated that a former Conrail executive indicated that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits." Pet. App. 7a. But whether Conrail would have implemented its policy even if it was unprofitable does not establish that the profitable policy it did implement is exclusionary. As the district court noted, there was no evidence that Conrail in fact ever refused to concur in a joint rate where it would have been more profitable to concur. *Id.* at 23a.

The court of appeals also cited other statements of Conrail officials as examples of Conrail's exclusionary purpose. Evidence of intent may be probative of the anticompetitive nature and effect of conduct.[17] But, even if Conrail's employees anticipated or desired the demise of D&H as a competitor, we do not believe that the record supports the inference that Conrail's actual conduct was exclusionary rather than efficiency-based. Conrail's policy

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[16] As *Aspen* makes clear, exclusionary rather than efficiency-based concerns may be probative of injury to competition. 472 U.S. at 608-609. This consideration, however, loses force in the unusual case where, as here, the absence of injury to competition is plainly shown by other factors.

[17] Contrary to Conrail (see Pet. 14, 17-21), we do not understand the court of appeals to have held that intent alone can transform otherwise lawful conduct into a violation; consequently, we do not believe that the second question presented by the petition (Pet. (i)) is raised by this case. The court specifically noted the statement of a Conrail vice president that he was in favor of Conrail's taking over D&H entirely. Pet. App. 7a. Although the district court considered that statement "relatively clear proof of monopolistic intent," *id.* at 19a, the court of appeals explained that the statement, "standing alone would not give rise to a § 2 violation." *Id.* at 7a.

benefitted Conrail without regard to its impact on D&H. If D&H had accepted Conrail's proposal and continued to carry the traffic, Conrail would have made just as much money as it did by carrying all the traffic over its own route, and newsprint shippers would have been no better and no worse off. Conrail was not "sacrific[ing] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen*, 472 U.S. at 610-611.

Nor was Conrail's policy one that inherently tended to exclude an equally efficient or more efficient competitor. D&H did not offer evidence explaining why it could not have operated profitably, if its costs were equal to or lower than Conrail's. Conrail's proposed division of revenues would have compensated D&H (for transporting the newsprint to the transfer point on the D&H/Conrail route) in an amount equal to Conrail's cost of transporting newsprint to that same point over its own route. Under that policy, if D&H could not prosper, the inference to be drawn is that its costs were greater than Conrail's.[18] On this record, it cannot be said that Conrail was "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605.

It is true that Conrail's make or buy policy did not lower Conrail's cost of providing service over its own track. Rather, the policy increased Conrail's profits by

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[18] We understand that "cost" in this context is based on an ICC methodology and includes both variable cost and some portion of fixed cost. Conrail was, in effect, offering to "buy" transportation over D&H's tracks at some price greater than its own variable cost, or, alternatively, selling transportation over the segment of its route that duplicated D&H's route at a price above its variable cost. We do not contend that a make or buy policy such as Conrail's could never have the effect of excluding an equally efficient competitor in the long run. And such an exclusion could affect consumers adversely. See, *e.g.*, *Chesapeake & Ohio Ry.*, 704 F.2d at 377 (closing of more efficient through routes by means of joint rate cancellations might be profitable in regulated market and may result in higher costs for transportation). But D&H presented no evidence of such circumstances in this case.

capturing for Conrail the rents attributable to the segments of the route on which Conrail faced no railroad competition. But that does not mean that the policy was not efficiency-based or lacked a valid business reason. Ordinarily, an efficient firm will seek to charge a profit-maximizing price. And it is not an antitrust offense for a lawful monopolist to charge a monopoly price. See generally, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.1g, at 756 (Supp. 1990); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Continental Cablevision* v. *American Elec. Power Co.*, 715 F.2d 1115, 1121 (6th Cir. 1983).[19] In any event, requiring the monopolist to share its revenues with a rival would not prevent consumers from having to pay the monopoly price.[20]

c. In remanding this case for a jury trial on the issue whether Conrail's conduct towards D&H violated Section 2 of the Sherman Act, the court effectively established a monopolist's duty to deal with a rival where, under

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[19] Any monopoly power Conrail possesses by virtue of its ownership of tracks is, of course, a product of Congress's action in creating Conrail. Although Congress intended Conrail to be subject to antitrust liability for any misuse of its power (see, *e.g.*, H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980) (cancellation of joint rates)), there is little room to argue—and we do not understand D&H to contend—that Conrail's acquisition of control over segments of track violated the antitrust laws.

[20] Nor should the fact that regulatory policy required the monopolist to share its profits with weaker competitors in the past impose a duty on the monopolist to continue sharing them once regulatory restrictions are removed. The Court in *Aspen* found it significant that the defendant had cooperated with the plaintiff in the past because the development and persistence of that cooperation was evidence that the cooperation was efficient. *Aspen*, 472 U.S. at 604 & n.31. But in *Aspen*, unlike this case, the cooperation had "originated in a competitive market," and similar arrangements prevailed in other competitive markets. *Id.* at 603. Here, in contrast, past practice was dictated by regulation and not by market forces. In that setting, there is no basis for inferring that a change in the defendant's practice is not based on efficiency concerns.

Aspen, no such duty exists. Although the court did not delineate the scope of that duty, the implication of its holding is that a monopolist must deal on terms that provide its rival with a reasonable profit, even if the monopolist must reduce its own profit to do so and there is no adverse effect on consumer welfare from a refusal to deal. We know of nothing in antitrust law that would require a monopolist to subsidize its rival's profits in this manner; indeed, such a requirement would be both unsound in theory and unworkable in practice.

Equally unsettling, the court's standard offers the monopolist no guidance in setting its price to a rival, if it must subsidize its rival's profit. Liability would inevitably turn on the trier of fact's conception of a reasonable price and a reasonable profit. The court of appeals seems to have decided this case in the spirit of the Transportation Act of 1920 ch. 91, 41 Stat. 456, not under the law of the Sherman Act. It is the former, not the latter, which "was designed for affirmative use in relieving the financial needs of weak carriers." *Great Northern,* 343 U.S. at 569.

2. Casting the issue in terms of an essential facilities analysis provides no additional support for the court of appeals' conclusion.[21] Even if we assume, as the district court did, Pet. App. 25a, that short-haul Conrail tracks that reach locations to which D&H lacks direct access may be considered an essential facility, D&H never requested the right to use those tracks to provide service itself, so far as this record reveals. Nor is D&H's complaint that Conrail will not provide service on those

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[21] Although this Court has never explicitly relied on the essential facilities doctrine and declined to consider it in *Aspen,* the elements of that doctrine are widely accepted in the lower courts. A four factor test is conventionally applied: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications* v. *American Tel. & Tel. Co.,* 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983), quoted at Pet. App. 9a.

tracks to D&H customers on a nondiscriminatory basis.[22] D&H's essential facilities claim reduces to a restatement of its argument that Conrail was obligated to share with D&H a portion of its monopoly revenues. That is, the true "essential facility" here is not track; it is money.

Considering D&H's claim under an essential facilities rubric should not change the result under Section 2. That is because D&H's claim still should fail unless Conrail's refusal to cooperate on the terms D&H desired adversely affects competition.[23] "The essential facilities doctrine is predicated on the assumption that admission of the excluded applicant would result in additional competition in an economic * * * sense." *Mid-South Grizzlies* v. *National Football League*, 720 F.2d 772, 787 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984); cf. *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (essential facility must be reasonably "indispensable to effective *competition*") (emphasis added), cert. denied, 480 U.S. 934 (1987). The issue whether the denial of access is unlawful cannot be approached solely by considering the impact of denial on a particular competitor. Where, as here, the party seeking access to a facility seeks merely to "share[] the

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[22] For that reason, the court of appeals' reliance on *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912), is misplaced. The passage of the Court's opinion quoted by the court of appeals (Pet. App. 9a-10a) discussed a requirement of *nondiscriminatory* access to an essential facility. *Terminal R.R.* did not impose a general duty to deal on "reasonable" terms.

[23] To the extent that the court of appeals considered denial of access to an essential facility to constitute a distinct antitrust offense, see Pet. App. 11a (referring to "the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization"), we disagree. Section 2 of the Sherman Act establishes no offenses other than monopolization, attempted monopolization, and combination or conspiracy to monopolize. The "essential facility" doctrine simply describes one form of conduct that may, in some circumstances, constitute monopolization or attempted monopolization.

monopolist's gains," increased competition is unlikely.[24] D&H may have required more favorable terms in order to achieve a certain level of profits, but requiring Conrail to grant D&H access on those terms will not increase competition: it will neither dilute any monopoly power Conrail has by virtue of its control of one segment of a route, nor affect the price and terms offered shippers.

The court of appeals did not ask whether the denial of access to D&H would have an anticompetitive effect; rather, as we read its somewhat Delphic opinion, the court was of the view that Conrail's conduct could be found unlawful solely by virtue of the magnitude of Conrail's increase in price and statements by Conrail executives that the court interpreted as supporting an exclusionary motive. But, if Conrail's conduct was, as the court did not dispute, designed to maximize its profits (both short and long-term), its conduct could be found "unreasonable" only if the jury were entitled to find that D&H had a right to share in Conrail's profits.[25] It is not the purpose of the antitrust laws, however, to impose the duty on a monopolist to assure that its rivals obtain a sufficient level of profit.

The Fourth Circuit's decision in *Laurel Sand & Gravel, Inc.* v. *CSX Trans., Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,312, at 65,185 (Jan. 30, 1991), illustrates

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[24] Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 Antitrust L.J. 841, 852 (1990) ("A single firm's facility * * * is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace"; "[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation.").

[25] Although the court did not explicitly articulate that proposition, we believe it to be the logical implication of the court's reasoning. If Conrail's increase in its share of contribution exposes it to liability even though that pricing policy maximizes Conrail's short and long-term profits and does not injure consumers, the only justification for so holding must be that Conrail's conduct is not "economically reasonable" *to D&H*.

our point.[26] There, the plaintiff alleged that defendant CSX had denied it access to an essential facility (CSX's track) by offering to transport the plaintiff's goods, while denying trackage rights to the plaintiff over CSX's track. Viewing CSX's offer of transportation as an alternative means of access to the facility, the Fourth Circuit considered whether CSX's offer of transportation was reasonable. It then held that the transportation offer was "a reasonable alternative" to trackage rights because it was "reasonable from CSX's perspective" to offer "$2.12 per ton, a penny over the variable costs." *Id.* at 65,190. The court added that "the reasonable standard of the access factor can not be read to mean the assurance of a profit" for the person seeking access. *Ibid.* In contrast to the Fourth Circuit's sound analysis, the court of appeals here seems to have required just that assurance.

3. In holding that a trier of fact could find unlawful Conrail's refusal to cooperate on the terms D&H desired, without regard to the effect of the refusal on competition, the decision below represents a serious distortion of antitrust law. Allowing a jury to evaluate the reasonableness of Conrail's actions from the standpoint of D&H's interests would, in practice, nullify this Court's admonition in *Aspen* that monopolists are under no general obligation to cooperate with their rivals. The result would be to transform Section 2 of the Sherman Act from a guardian of competition to a regulatory statute focused on the welfare of competitors.

Such a transformation, which in this case resurrects an abandoned regulatory regime, would have substantial anticompetitive consequences. Recognizing a duty to share profits with competitors would reduce incentives to investment and innovation by siphoning off the rewards normally accruing to desirable behavior. And distributing profits to competitors would reduce the incentive to strive for greater efficiency, or even prevent the

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[26] The court of appeals discussed the district court's decision in *Laurel Sand*, Pet. App. 10a; subsequently, the Fourth Circuit affirmed the judgment in that case.

exit of inefficient firms from the market and the redirection of their resources to more productive uses. Moreover, the duty the court of appeals appeared to create could chill aggressive competition as firms, uncertain of what prices they may charge their competitors and yet avoid liability, were forced to set prices on some basis other than ordinary profit maximization. In effect, firms would be forced to guess what prices would be required by unpredictable regulatory decrees issued by particular juries.

We note, in closing, the obvious prudential factors pointing in favor of letting this case go, namely, it is of course in an interlocutory posture, and the court of appeals was less than clear about the nature of the required "reasonable" dealing that it applied to Conrail's conduct. That being said, the fact remains that the court of appeals has held that the trier of fact could find Conrail liable in the absence of any reason to believe that consumers and competition were adversely affected. The only issue for trial is whether Conrail's terms for cooperation were "reasonable" in some sense foreign to the antitrust laws.

The very requirement that such an issue need be submitted to trial, rather than resolved on summary judgment, is itself a serious error. The salutary principle reflected in this Court's decision in *Matsushita*—a point that bears reemphasis—is that antitrust defendants should not be subjected to the formidable burdens and risks of trial on the basis of evidence that is insufficient to support a viable theory of antitrust liability. Decisions such as this one, by failing to apply *Matsushita* with rigor and by misapplying basic antitrust doctrine, not only affect the particular parties but also, through their impact on antitrust counseling, more broadly influence business practices. Indeed, the vagueness of the court's opinion may contribute to its impact, because the threat of burdensome litigation and possible treble damages liability tends to induce firms to stay well within the bounds of established law. In light of these considerations, we believe that review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE; 1991 282061 20460

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No. 90-380

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,

—against—

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent, Delaware & Hudson Railway Company ("D&H") submits this supplemental brief in opposition to the brief for the United States as amicus curiae which was submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

PRELIMINARY STATEMENT

Like Consolidated Rail Corporation ("Conrail"), the Solicitor General, in his brief in support of the petition by Conrail for a writ of certiorari, does not demonstrate that this case presents conflicts with other decisions, significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10. In fact, the Solicitor General provides as much support for D&H's opposition to the petition for a writ of certiorari as he does for Conrail's petition. First, the Solicitor General does not contend (as does Conrail) that the decision below conflicts with the decisions of other courts of appeals. Conrail contends the decision below conflicts with the decisions of other courts of appeals because those courts have held "that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent." (Pet. at 18.) In direct opposition to this contention, the Solicitor General stated:

> Contrary to Conrail (see Pet. 14, 17-21), we do not understand the court of appeals to have held that intent alone can transform otherwise lawful conduct into a violation; consequently, we do not believe that the second question presented by the petition (Pet. (i)) is raised by this case.

(Amicus at 12 n.17.) Second, Conrail argues that this case presents significant legal issues warranting review by this Court since "[t]his case . . . squarely presents the question whether the essential facilities doctrine permits recovery that

1 D&H's corporate affiliates are listed in D&H's initial brief.

would otherwise be unavailable under Section 2 [of the Sherman Act]." (Pet. at 22-23.) The Solicitor General, however, does not object to the reliance by the court below on the essential facilities doctrine in determining whether a question of fact exists. In fact, he specifically adopts the articulation of that doctrine in *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), and argues only that the present case is distinguishable from this Court's decision in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912). (Amicus at 15-16.) Third, the Solicitor General concedes that there are not "special and important reasons" for granting a writ of certiorari at the present time. While Conrail ignores the fact that review by this Court is inappropriate at the present time, the Solicitor General states that there are "obvious prudential factors pointing in favor of letting this case go, namely, it is of course in an interlocutory posture, and the court of appeals was less than clear about the nature of the required 'reasonable' dealing that it applied to Conrail's conduct." (Amicus at 19.) Thus, the Solicitor General has substantially undercut Conrail's contentions in these various regards.

REASONS FOR DENYING THE WRIT

I.

THE SOLICITOR GENERAL IGNORES FACTS IN THE RECORD BELOW

The Solicitor General's brief in support of the petition by Conrail for a writ of certiorari rests on the mistaken premise that D&H challenges only Conrail's use of its so-called "make or buy" policy. On the contrary, D&H contends that both (1) Conrail's outright refusals to concur in joint rates with D&H and (2) its "make or buy" policy serve as separate (although related) factual predicates for D&H's monopolization claim. In the former regard, there is ample evidence that Conrail routinely refused to concur in joint rates, thus effectively precluding D&H from competing with Conrail for ser-

vice to those consignees served only by the Conrail tracks that surrounded D&H. For instance, Mr. Behe, Conrail's Line of Business Unit Manager for Forest Products from 1982 through 1985, testified as to his outright refusal to concur in joint rate reductions initiated by the Canadian National Railway ("CN") in instances where the proposed rate reductions related to routes involving D&H. (Resp. A. 3A).

In any event, contrary to the assertion of the Solicitor General, the court of appeals correctly determined that the "make or buy" policy could be the functional equivalent of an outright refusal to cooperate by Conrail. *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990) (Petition Appendix ("A") 4a). Pursuant to the "make or buy" policy, Conrail made D&H's cost of access to Conrail's routes prohibitively expensive. Under the "make or buy" policy, Conrail conditioned its concurrence in joint rates involving D&H on receiving the same amount of contribution (i.e., revenues less expenses) over its short haul route (the route involving D&H) as it would receive over its long haul route (the route that does not involve D&H) thus effectively shifting much of Conrail's costs to D&H and proportionately *decreasing* D&H's revenues. Conrail, like the monopolist defendant in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), was making D&H " 'an offer that [it] could not accept.' " *Id.* at 592 (citation omitted.)

This effect is evident from the example relating to the carriage of newsprint from Quebec to Lancaster, Pennsylvania that the court of appeals adopted in its opinion. Nevertheless, the Solicitor General objects to the use of that example even though both Conrail and D&H relied upon it in their briefs before the court of appeals, 902 F.2d at 176-77 (A. 3a.), and Conrail first postulated it in the district court. *See Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 724 F. Supp. 1073, 1077 (N.D.N.Y. 1989) (A. 21a). Moreover, that example is grounded in fact. Conrail adopted that example directly from the deposition testimony of Mr. Behe concerning the

request of CN to offer a reduced rate to a shipper in Quebec on paper traffic to Lancaster, Pennsylvania. *See* Memorandum of Law in Support of Motion of Defendant Consolidated Rail Corporation for Summary Judgment at 23. Thus, Conrail does not and cannot contest the description of the effect of the application of the "make or buy" policy on D&H which was adopted by the court of appeals. Given the fact that the example at issue has been adopted by Conrail below, D&H believes it inappropriate for the Solicitor General, as amicus curiae, to now put it at issue. *See Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (declining to pass upon an argument made by amicus curiae which had never been advanced by petitioners).

Although the district court and the court of appeals applied hypothetical revenue and cost estimates to the Lancaster example put forth by Conrail in its briefs below (presumably because Conrail did not supply those figures itself), the record contains evidence which indicates that the assumptions adopted by the courts below were correct.[2] In fact, when the court of appeals outlined some of the evidence which would support a jury finding that Conrail's actions were anticompetitive, it referred to an actual instance of the application of the "make or buy" policy which verifies the court of appeals's reliance upon the Lancaster example. In the instance alluded to by the court of appeals, a pricing analyst for Conrail concluded that the application of the "make or buy" policy to a joint route for traffic from Nova Scotia to Pennsylvania would result in a division of revenues that "would be almost ludicrously low" from the point of view of D&H. 902 F.2d at 178-79 (A. 7a).[3]

2 In addition, Conrail also relies upon hypothetical figures with respect to the Lancaster example to demonstrate the effect of the "make or buy" policy. *See* Brief of Defendant-Appellee at 24-25 n.15.

3 This factual support for the conclusion of the pricing analyst is contained in plaintiff's deposition exhibit 23, a Memorandum dated January 4, 1984 from D.S. Kalapos to C.N. Marshall.

Nevertheless, the Solicitor General argues that D&H should have been able to compete with Conrail had it been more efficient than Conrail (i.e., had its costs been lower than Conrail's). This argument must be rejected on two grounds. First, any issue relating to D&H's efficiency is a question of fact and cannot be decided by this Court as a matter of law based upon the supposition by the Solicitor General that such efficiencies were achievable. Second, the efficiency argument does not begin to address the outright refusals by Conrail to concur in joint rates involving D&H.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED BY THIS COURT IN *ASPEN SKIING CO.*

The Solicitor General appears to argue that the court of appeals did not apply the standard enunciated by this Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), because it considered the effect Conrail's actions had on D&H. Here, the Solicitor General overlooks Conrail's refusals to concur and compares the facts in *Aspen* only to Conrail's "make or buy" policy. In addition, the Solicitor General overlooks both the procedural setting of *Aspen* as well as a substantial amount of evidence as to the intent and effect of Conrail's actions.

As to the procedural setting of *Aspen*, this Court was reviewing a trial record to determine whether it supported the jury's disposition of the factual question as to whether the defendant's conduct was anticompetitive in intent and effect or pursuant to a legitimate business purpose. In that context, this Court made a plenary review of the record and concluded that all the evidence, including the evidence of the larger competitor's foregoing of short-term benefits, "comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." 472 U.S. at 610. Moreover, this

Court made it clear in *Aspen* that the factual issue of whether a monopolist's actions can "properly be characterized as exclusionary" necessarily involves an analysis of the effect of the conduct (1) on consumers, (2) on the competitor and (3) on the monopolist itself. 472 U.S. at 605. The Solicitor General, like Conrail, ignores evidence put forth by D&H below addressing this tripartite analysis in *Aspen* and argues that the court of appeals focused only on the harm to D&H and not on the impact on consumers.

In fact, it was Conrail's one-dimensional argument with respect to *Aspen* that led the court of appeals to focus in large part on the impact Conrail's actions had on D&H. In its briefs below, Conrail had placed overwhelming emphasis on its contention that its actions were not anticompetitive because they were prompted solely by its desire to maximize its profits. Indeed, Conrail hardly disputed D&H's contention that shippers had been harmed. As a result, the court of appeals correctly directed its attention to what it believed was Conrail's "most significant contention" with respect to whether there was "a genuine issue of material fact as to whether Conrail's make or buy policy constituted willful anticompetitive conduct," i.e., whether Conrail was insulated from liability because its policy was intended to increase short-term, as well as, long-term profits. 902 F.2d at 178 (A. 6a).

In any event, the deposition testimony of Mr. Behe indicates that certain shippers were harmed by Conrail's actions because their preferences were ignored.[4] Mr. Behe testified about a series of telexes relating to rate reductions on newsprint traffic from Quebec to Allentown and Minersville, Pennsylvania. He testified that Conrail concurred in the rate reductions that involved Conrail's routes and did not concur in the reductions that involved D&H's routes. Dep. of Michael R. Behe at 206 (Nov. 13, 1987). He also testified

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4 It should be assumed that the court of appeals took note of this evidence because it stated that it had reviewed the record de novo to determine whether there are genuine issues of material fact. 902 F.2d at 177 (A. 5a).

that one of the telexes contained a handwritten note indicating that the traffic was "*all* going D&H currently." (emphasis added) (Resp. A. 4A; emphasis added.) Thus, it is evident that the shippers of newsprint from Quebec to Allentown and Minersville had a decided preference for using D&H prior to the rate reductions notwithstanding the fact that D&H's rates on those routes were equal to Conrail's at that time.

Despite this evidence of consumer preferences, the Solicitor General argues that there is no evidence that shippers, rather than the originating railroads, chose the route for traffic or cared which of two equally priced routes were selected. (Amicus at 11.) There is nothing in the record below, however, which would support this supposition and, indeed, Conrail itself has never made this argument. Additionally, this contention proceeds from the assumption that D&H and Conrail compete only in terms of price. As indicated by the foregoing example, prior to Conrail's refusals to concur in joint rates with D&H, all the traffic on the Allentown and Minersville routes might well have been "going D&H" because of non-price factors such as speed and quality of service. Indeed, Richard Hasselman, Conrail's Senior Vice-President for Operations, conceded in his deposition that D&H had the most direct route to Canada and added that he would have liked to have had that route in the Conrail system. Dep. of Richard B. Hasselman at 138 (Jan. 11, 1988). Moreover, there is no indication in *Aspen* that this Court considered the *price* of ski tickets when it analyzed whether consumers had been harmed. Rather, this Court found that consumers had been harmed because they had a decided preference for skiing all four mountains at Aspen rather than the three mountains controlled by the monopolist. *See* 472 U.S. at 606.[5]

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5 In fact, this Court has long recognized that there can be competition that is not related to price. *See, e.g.*, *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 393 (1912) (the presence of more than one operator of railroad terminal facilities in St. Louis, "at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service").

In any event, the Solicitor General effectively concedes that his argument that D&H and Conrail could compete only in terms of price is wrong when, in the context of his argument that shippers did not prefer D&H to Conrail, he makes the statement: "If D&H offered services that shippers valued and could not obtain from Conrail, then shippers presumably would have been willing to pay a higher rate to obtain joint D&H/Conrail service." (Amicus at 11-12.)

In addition, although the Solicitor General contends that Conrail was not " 'sacrific[ing] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival'," the record contains evidence that Conrail sacrificed consumer goodwill in order to achieve its goals. (Amicus at 13 (quoting *Aspen*, 472 U.S. at 610-11).) In *Aspen*, skiers wished to use all four mountains rather than the three offered by the larger competitor and this Court found that the larger competitor sacrificed consumer goodwill by ignoring this preference. 472 U.S. at 610-11. Similarly, in the present case, certain shippers preferred to use D&H but Conrail ignored that preference by refusing to concur in joint rates. Moreover, to suggest that *Aspen* stands for the proposition that the plaintiff in an antitrust case must proffer evidence that the defendant sacrificed short-term benefits for anticompetitive reasons erroneously elevates one evidentiary fact relied upon by this Court to a principle of law.

III.

THE COURT BELOW CORRECTLY APPLIED THE ESSENTIAL FACILITIES DOCTRINE

Once again, in discussing the court of appeals's application of the essential facilities doctrine to the present case, the Solicitor General focused solely upon Conrail's "make or buy" policy and did not discuss Conrail's refusals to concur. Additionally, while the Solicitor General does not disagree with this Court's reasoning either in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912), or the articulation of the essential facilities doctrine by the court of appeals in *MCI*

Communications Corp. v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), he argues that *Terminal Railroad* is distinguishable from the instant case because *Terminal Railroad* mandates only "*nondiscriminatory* access to an essential facility," not a "general duty to deal on 'reasonable' terms." (Amicus at 16 n.22; emphasis in original.) In fact, this Court concluded its opinion in *Terminal Railroad* by decreeing that access to the essential facility be "upon such just and reasonable terms and regulations as will in respect of use, character and cost of service, place every such company upon as nearly *an equal plane* as may be with respect to expenses and charges as that occupied by the proprietary companies." 224 U.S. at 411 (emphasis added).

Moreover, the decision below is entirely consistent with the decision of the court of appeals in *Laurel Sand & Gravel, Inc.* v. *CSX Transportation, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,312 (4th Cir. Jan. 30, 1991), which the Solicitor General cites with approval. (Amicus at 17, 18.) In *Laurel Sand*, the Fourth Circuit concluded (as did the court below) that it is appropriate to consider whether the terms of an offer to deal are so unreasonable as to constitute denial of access to an essential facility. *See Laurel Sand*, 1991-1 Trade Cas. at 65,190. In that case, as the Solicitor General notes, the court of appeals adopted the "reasonable standard of access factor" as part of its four-part test to determine whether there has been denial of the use of an essential facility. *Id.* Nevertheless, the Solicitor General argues that the decision below conflicts with *Laurel Sand* because the court of appeals stated that the offer of access to the facility in that case "was a 'reasonable alternative' to trackage rights because it was 'reasonable from [the defendant railroad's] perspective to offer $2.12 per ton, a penny over the variable costs.' " (Amicus at 18 (quoting *Laurel Sand*).) There, the court of appeals addressed that prong of the essential facilities doctrine which requires that the plaintiff asserting an essential facilities claim demonstrate that "it could not reasonably duplicate or pursue a reasonable alternative to the essential facility." *Laurel*

Sand, 1991-1 Trade Cas. at 65,189. In *Laurel Sand*, the court held that of the three options available, i.e., duplicating the defendant's tracks, entering a joint rate agreement or leasing trackage rights, the first (as here) was "economically impractical," but the second was deemed reasonable because such access to the essential facility was offered by the defendant at a rate only marginally above its variable costs and less than that charged to plaintiff's competitors. Given these facts, one can hardly fault the court of appeals for focusing on "[the alleged monopolist's] perspective" and not requiring the monopolist to participate in a joint rate at a loss. Finally, the court of appeals concluded that the defendant in *Laurel Sand* was not required to lease trackage to the plaintiff since that would have radically altered its historical business and have "transform[ed] [it] into a 'toll collector'." 1991-1 Trade Cas. at 65,190. D&H seeks neither to force Conrail to participate in joint rates at a loss or to engage in business practices foreign to it. On the contrary, D&H simply seeks the maintenance of historic business relationships and access to Conrail's unndeniably essential facility on a "nondiscriminatory" basis.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: April 18, 1991

Respectfully submitted,

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